

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

TRANSCRIPT OF PROCEEDINGS

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DAVID M. DAUGHERTY, : CIVIL ACTION
:
Plaintiff, : NO. 5:14-CV-24506
:
vs. :
:
OCWEN LOAN SERVICING, LLC, : May 20, 2016
:
Defendant. :
:
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TRIAL
VOLUME V

BEFORE THE HONORABLE IRENE C. BERGER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE COURT: Good morning, everyone.

All right. We'll begin this morning, Mr. Manning, with your Rule 50 motion.

MR. MANNING: Thank you, Your Honor.

We're here on defendant Ocwen's Rule 50 motion. The Court -- the standard is well established that the Court's the gatekeeper. Here this is particularly true on two elements. Number one, legal causation; number two, actual damages.

Those are things that the Court traditionally is in a position needing to ensure that the jury understands that they're not speculating. And it has to be legally sufficient.

In this case, plaintiff's evidence cannot prove to a reasonable juror by preponderance of the evidence that either of those elements have been met.

There's no expert witness offering any disclosed opinion by the plaintiffs on either causation or damages. Plaintiff has no Equifax credit report in evidence, not even for the truth of the matter asserted. Plaintiff has no credit denials in evidence for the truth of the matter asserted.

Plaintiff can only invite the jurors to speculate as to the cause and any speculative damage. There's no evidence

1 offered at all about quantifying any even speculative actual
2 damage.

3 The case law on these issues, Judge, is clear.
4 Plaintiff has to prove actual damages. It's a required
5 element. *Sarver vs. Experian*, 390 F.3d 969, Seventh Circuit
6 2004, no need to reach the issue of reasonable procedures
7 because plaintiff's claim failed for another reason, lack of
8 damages.

9 *Tinsley vs. TransUnion Corporation*, 879 F.Supp. 550,
10 the District of Maryland, 1995. It was affirmed by the
11 Fourth Circuit, 64 F.3d 659. That was also 1995. There the
12 Court said, quote, "Plaintiff's case similarly falters on
13 the matter of damages. Quite simply, he has none. The
14 absence of any economic damage dooms plaintiff's venture in
15 this court," end quote.

16 In order to recover actual damages, plaintiff must show
17 that Ocwen's violation of the statute, the failure to
18 conduct a reasonable investigation, caused the loss of
19 credit. And that case is *Bach vs. First Union National*
20 *Bank*, 149 F. App'x 354, Sixth Circuit, 2005; also *Cahlin vs.*
21 *General Motors Acceptance Corporation*, 936 F.2d 1151,
22 Eleventh Circuit, 1991, upholding the grant of summary
23 judgment because of plaintiff's failure to prove a causal
24 connection between the statutory violation and plaintiff's
25 injury.

1 Plaintiff has the affirmative duty to present evidence
2 supporting his claim that allegedly an inaccurate credit
3 report caused him, *Fahey vs. Experian*, 571 F.Supp. 2d 1082,
4 Eastern District of Missouri.

5 *Matise vs. TransUnion Corporation*, 1998, U.S. Dist.
6 LEXIS 19775, Northern District of Texas. Quote: "A
7 plaintiff asserting an FCRA claim has the burden of proving
8 that his damages were caused by the defendant's violations
9 of the FCRA. To meet this burden, the plaintiff must show
10 the inaccurate information contained in the credit bureau
11 report, rather than a report from a different credit report,
12 caused his injury."

13 *Pendleton vs. TransUnion System Corporation*, 76 F.R.D.
14 192, Eastern District of Pennsylvania. Quote: "A consumer
15 who is denied credit must show that the denial is caused by
16 inaccurate entries rather than by correct adverse entries or
17 any other factors. Plaintiff is required to show the
18 erroneous entry was, quote, a substantial factor in bringing
19 out the denial of the credit."

20 Here there's no evidence that's actually been admitted
21 for the truth of the matter asserted to prove that causal
22 connection.

23 As an initial matter, plaintiff can't show that Ocwen's
24 alleged failure to conduct a reasonable investigation caused
25 the Equifax duplicative tradeline. The evidence is now

1 agreed by both parties that Equifax caused that error.

2 Next, each time Ocwen received the dispute, the Ocwen
3 employees investigated the dispute that was provided, 001 or
4 106/007. Equifax continued to have both tradelines even
5 though the old information was still on there.

6 Claimed credit denials here from Quicken Loans and
7 Embrace Loans, Judge, those actually confirm that there's no
8 causation or damages. In this case, both of those credit
9 denials, again, not for the truth of the matter asserted --
10 I understand the Court's ruling on that point -- but those
11 were in reliance on the TransUnion report which confirms
12 that there was no basis for claiming that anything Ocwen was
13 doing or failing to investigate could have caused a credit
14 denial.

15 As that prior case stated, Judge, they have to prove
16 the inaccurate entries on the Equifax report caused as
17 opposed to a different credit bureau's report.

18 Now, One Community Federal Credit Union was deposed and
19 there was a deposition read into evidence by their corporate
20 representative. That was not a credit denial. And there's
21 a clear distinction in the law on that. It was not
22 processed to completion. And that was admitted by the
23 corporate representative.

24 And that corporate representative went on to state that
25 based on plaintiff's credit report, he could not say that he

1 would have been approved. There were too many other
2 factors. That corporate representative also clearly stated
3 that he had not even considered the loan-to-value ratio or
4 the debt-to-income ratio, both of which he said were
5 required to even start the process.

6 There's no evidence of any quantifiable economic
7 damages. This is that second piece, Judge. There hasn't
8 been any evidence to identify any actual economic harm.
9 There's no denials. There's no showing of any additional
10 interest or any, anything conceivable in the terms of a
11 quantifiable number. It's raw speculation.

12 Now, plaintiffs have offered Mr. Hendricks and we had
13 moved to strike his testimony on causation and damages
14 because it was undisclosed. And I know that that's pending
15 before Your Honor. I'd like to renew that motion.

16 The 26(a)(2)(B) disclosure written report must contain
17 all of the opinions. It's clear there's no causation or
18 damages disclosed. And 26(e)(2) requires that to be
19 supplemented, which it wasn't.

20 So then you go to Rule 37 and there's two West Virginia
21 Federal Court cases on point. And I'm going to cite both of
22 them for you, Judge. *Markel vs. United States*, 2015, U.S.
23 Dist. LEXIS 95610. The pin cite is 3. Northern District of
24 West Virginia, July 22nd, 2015.

25 The second case, Judge, is *Hershberger vs.*

1 *E-t-h-i-c-o-n Endo-Surgery*, 2012, U.S. Dist. LEXIS 63618.
2 The pin cite is 5. Southern District of West Virginia,
3 May 7th, 2012.

4 Very briefly, in *Hershberger* the expert opinion -- the
5 expert rendered an opinion during the *Daubert* hearing that
6 hadn't been disclosed. The other party claimed prejudicial
7 impact and moved to strike.

8 The Court agreed that the untimely disclosure was
9 prejudicial; that no other cure was sufficient, and that the
10 non-disclosing party had no excuse for the failure to
11 disclose.

12 In the *Markel* case, very briefly, the United States
13 timely disclosed its expert and the expert's report. The
14 expert, however, was then offered to provide undisclosed
15 opinions, just like this case, Judge, and he tried to talk
16 about causation, same as this case.

17 Applying the Fourth Circuit's *Southern States Rack and*
18 *Fixture* decision, 318 F.3d 592, pin cite 597, Fourth
19 Circuit, 2003, the Court there ruled that the failure to
20 disclose the opinion was not substantially justified or
21 harmless. Accordingly, quote, the expert's testimony was
22 limited to the opinions expressed in his expert report.

23 And, Judge, we've asked for a curative instruction on
24 that issue to the jury.

25 Next we move to emotional distress damages. Emotional

1 distress is, quote, from the Fourth Circuit, easily
2 susceptible to fictitious and trivial claims, end quote.
3 *Price vs. City of Charlotte*, 93 F.3d 1241, pin cite 1250,
4 Fourth Circuit, 1996. Plaintiff must, quote, reasonably and
5 sufficiently explain the circumstances of the injury and not
6 resort to mere conclusory statements, end quote.

7 There's a number of factors that the Fourth Circuit has
8 talked about there. The *Sloane vs. Equifax* case, F. -- I'm
9 sorry -- 510 F.3d 495, Fourth Circuit, 2007; *Ross vs. FDIC*,
10 625 F.3d 808, Fourth Circuit, 2010.

11 And there what happened was presented only with the
12 conclusory assertions, no reasonable jury could find that
13 the defendant's debt collection practices were the proximate
14 cause of his emotional distress.

15 Next, *Cousin vs. TransUnion*, 246 F.3d 359, Fifth
16 Circuit, 2001, holding, "In the context of an FCRA claim,
17 the emotional distress must be supported by evidence of
18 genuine injury requiring," quote, "a degree of specificity
19 which may include corroborating testimony or medical or
20 psychological evidence," end quote.

21 Here there's no corroborating evidence. The only
22 testimony is that he felt stressed and from his wife that
23 he -- that she noticed that he felt stressed. There's no
24 evidence of a genuine injury.

25 That stress has to be distinguished from all the

1 pre-existing medical conditions and the fact that he wasn't
2 able to qualify for credit for any other reason.

3 It's undisputed there were 11 other collection accounts
4 and two tax liens. There's no medical attention. There's
5 no psychiatric attention. There's no psychological
6 treatment. There's no physical manifestation whatsoever.
7 And the Fourth Circuit required factors don't exist.

8 Next, Judge, we move to no willfulness. Plaintiff
9 cannot prove that Ocwen's practices and procedures were
10 objectively unreasonable interpretation of the statute.
11 Ocwen investigated and responded to every ACDV governed by
12 the Equifax dispute code that Equifax interpreted and
13 applied to the ACDV forms.

14 That governs the dispute resolution process. And the
15 information provided in the ACDV is controlled by Equifax
16 and provided to Ocwen.

17 It's undisputed, Judge, that no one ever told Ocwen in
18 a single ACDV form, as even plaintiff's own expert
19 testified, duplicative tradeline or two, two tradelines, one
20 account should have been in the FCRA relevant information
21 box and it's undisputed it was not.

22 There's no evidence that Ocwen ignored a single ACDV,
23 that it failed to respond to a single ACDV, or that it was
24 late in responding to a single ACDV. There's no conscious
25 disregard whatsoever.

1 The plaintiff bears the burden of demonstrating that
2 Ocwen's conduct was willful. *Parker vs. Sony Pictures*
3 *Entertainment*, 260 F.3d 100, Second Circuit, 2001, willful
4 violations may be either knowing or reckless, as Your Honor
5 knows. To prove a knowing violation -- I'm not going to
6 belabor this too much, Your Honor, just because there's no
7 evidence of it.

8 *Dalton vs. Capital Associated Industries*, 257 F.3d 409,
9 Fourth Circuit, 2001. It requires willfulness
10 representations, concealment, refusal to investigate,
11 intention to thwart conscious rights of the plaintiff to
12 have accurate information. None of that exists. There's no
13 evidence of any of that.

14 The evidence shows, and it's undisputed, that Ocwen
15 didn't know the duplicative tradeline was being reported.
16 It didn't cause it and it wasn't told about it.

17 There's no evidence of knowing refusal. Plaintiff
18 didn't tell Ocwen. Plaintiff didn't tell Equifax.
19 Plaintiff didn't tell the CFPB. The Aggressive Credit
20 Repair Company didn't tell Equifax. Equifax didn't tell
21 Ocwen. And Ocwen never even saw plaintiff's credit report.

22 Plaintiff's claim here, Your Honor, is they should have
23 figured it out. That's not willful. The mere failure to
24 conduct a reasonable investigation or the mere failure to
25 discover the dispute or if it could have been better, that's

1 not willful. At best, that's negligent. There's no basis
2 for willfulness in this case.

3 The next piece, Judge, after knowing is recklessness.
4 I've already touched on a lot of this. In *Safeco* the first
5 inquiry is objective unreasonable. That's the determination
6 of this Court. It can even go beyond what I've already
7 talked about without inviting that consideration.

8 Next what we have here is the statute requires the
9 furnisher, that's Ocwen, to investigate the dispute
10 identified by the credit bureau. That dispute governs the
11 dispute process.

12 The testimony is Ocwen went to the dispute code, took
13 all the information, had access to all the systems, was able
14 to access those and respond. The test, Judge, isn't could
15 they have done more, or could they have somehow become a
16 detective and deduced the real source of the problem.
17 That's not the test. There's no willfulness.

18 Next I'm going to touch briefly on the reasonable
19 investigation factors. *Johnson vs. MBNA America Bank*, 357
20 F.3d 426, Fourth Circuit, 2004. To succeed, plaintiff has
21 to prove by a preponderance of the evidence the
22 investigation was unreasonable.

23 And, again, the key here, Judge, is after receiving the
24 notice of the dispute with regard to the completeness or
25 accuracy of the information provided by the credit bureau to

1 the furnisher, in this case Ocwen, the requirement is the
2 furnisher uses the disputed information and reviews the
3 relevant information governed by that dispute. And you've
4 heard that in this case. And the evidence shows that that's
5 what they did. They have to consider that the furnisher's
6 procedures mirror that requirement.

7 Now, the next case I'd like to cite is the
8 reasonableness depends on the information provided by the
9 credit bureau to the furnisher, *Alston vs. United*
10 *Collections Bureau*, 2014 U.S. Dist. LEXIS 27124. That's the
11 District of Maryland, 2014. And it was affirmed by the
12 Fourth Circuit, 585 F.App'x 196.

13 All of those disputes were provided, investigated,
14 responded to. And the only thing that was being verified
15 was the dispute because the dispute code governs the
16 process.

17 Ocwen had no duty to investigate or discover on its own
18 that Equifax, separate and apart from anything that Ocwen
19 did, had incorrectly created this duplicative account and
20 then never updated it at any point in time until it later
21 removed it totally. It never actually got updated.

22 The evidence is clear that here one of the two
23 tradelines Equifax was reporting was perfect. Their expert
24 even said it was correct, there's no error, which further
25 demonstrates the reasonableness of Ocwen's investigation in

1 this case.

2 And for that reason, we would ask the Court to enter
3 judgment in favor of the defendant.

4 THE COURT: All right. Thank you.

5 Response, Mr. Nolan.

6 MR. NOLAN: Your Honor, under the Fair Credit
7 Reporting Act, Section s-2(b)(1)(A), a furnisher has a duty
8 upon receiving a notice of a dispute from a credit reporting
9 agency in the form of an ACDV to conduct an investigation
10 with respect to the disputed information.

11 The Fourth Circuit has held in *Johnson vs. MBNA* that
12 this investigation has to be reasonable.

13 The Fourth Circuit has infused a qualitative element
14 into this requirement saying that a furnisher must conduct a
15 searching inquiry into the dispute. That's the Eastern
16 District of Virginia case of *Jones vs. Experian*.

17 A reasonable investigation requires the data furnisher
18 to go beyond a cursory review of its internal records, again
19 stated by *Johnson vs. MBNA*.

20 The *Saunders vs. Equifax* court decided that a data
21 furnisher may not restrict its investigation to information
22 provide by the CRA.

23 And that last point I think is the most important point
24 to make here, Your Honor, because the entire defense has
25 been set up upon the basis of the fact that they restricted

1 their dispute investigation to the information provided in
2 the dispute code by the CRA, not even the entire ACDV. They
3 just restricted their investigation to a dispute code.

4 They did not look at Mr. Daugherty's letters. They did
5 not look in their internal records to see the CFPB
6 investigation. They did not look at their records to see
7 any phone calls with Mr. Daugherty. So we're not saying
8 that they should have done X, Y, or Z. We're saying they
9 didn't even look at their own records in this case as the
10 evidence has shown.

11 They've testified that they're not going to look beyond
12 the dispute code; that the policy and procedure of Ocwen is
13 to only look at the dispute code. It falls back to the
14 dispute code. They don't go beyond the dispute code.

15 And, again, a data furnisher may not restrict its
16 investigation to the dispute code provided by the CRA.
17 Ocwen restricted its review to strictly that.

18 She stated it was a superficial investigation. I
19 understand that there's a quibble over the terminology in
20 her testimony regarding that.

21 But, Your Honor, their entire defense is based on
22 faulty reading of Fourth Circuit law which has been clearly
23 established since 2004 with *Johnson vs. MBNA* that the
24 investigation must be a searching inquiry. It must be a
25 reasonable investigation.

1 And their expert even said yesterday that all they are
2 looking at is the dispute code. And that's a faulty basis
3 of the law. And if anyone should be receiving a directed
4 verdict on that issue, I believe the plaintiff's entitled to
5 a directed verdict on liability, not only for negligence but
6 for willfulness for having a policy and procedure that does
7 not require a reasonable inquiry of disputes that come in.

8 And, further, under Section s-2(b)(1)(B), Ocwen's
9 required to review all the relevant information provided by
10 the Consumer Reporting Agency.

11 Again, Ocwen testified that they limited their
12 investigations to the dispute code provided by the CRAs.
13 They testified they didn't even look at the entire ACDV
14 form.

15 They didn't look at the "foreclosure proceedings
16 started." They didn't look at the past due amount. They
17 didn't even look at the date open because when they checked
18 the document that the plaintiff signed, that was a document
19 signed in July of 1999. The document they verified -- the
20 ACDV they verified said August, 1999.

21 So they're not even doing a proper check under their
22 own standards to verify the accuracy of the information.

23 Again, Your Honor, I believe the only finding is that
24 Ocwen's policy and procedure shows a willful disregard of
25 the established precedent and established law in the Fourth

1 Circuit about the investigation and about the information
2 that they must look at. They did not conduct a reasonable
3 investigation of any of these disputes.

4 Regarding the damages the plaintiff suffered, he
5 suffered actual damages in this case, Your Honor.

6 One category of damages is credit denials. There's no
7 dispute that he hasn't received a loan for his mortgage and
8 he's, in fact, denied loans by the One Community Federal
9 Credit Union based on the fact that that was a stop sign
10 when they saw the mortgage tradeline on his tri-merge
11 report, which has been admitted as Exhibit Number 25.

12 He's been inaccurately described as not creditworthy to
13 third parties based on his foreclosure notation on his
14 account. He's expended time and energy to correct errors
15 that were not of his own making beginning in March, 2013,
16 and extending all the way up through the present. He has
17 not had a moment's rest trying to dispute this account, this
18 wrong information that was not his making.

19 Ms. Daugherty testified regarding his sleeplessness,
20 his sense of helplessness. He testified that he felt like
21 he was sinking and that Ocwen was the anchor.

22 These are categories of actual damages that have been
23 presented to the jury. And this is distinguishable from a
24 case such as *Doe vs. Chao* where there was a data breach and
25 there was a potential that harm may occur if someone was

1 able to obtain a Social Security number and misuse it.

2 Here we have the concrete timeline that he's trying to
3 dispute inaccurate information on his report. He has a
4 balloon note that's coming due, and the pressure that is
5 created by every dispute that passes, every month that
6 passes, every conversation that passes.

7 The increasing stress, the increasing pressure was
8 played out in his testimony, and he should be entitled to
9 have a jury determine whether or not he's entitled to
10 compensation on actual damages.

11 You know, some of the factors -- we've discussed the
12 time and energy it takes to solve the problem, the
13 expectation that the problem was solved, the number of
14 recurrences.

15 Ocwen claims they fixed it on a couple of occasions.
16 But due to their faulty investigations, the information
17 continued to occur over and over again. And the period of
18 time -- the sheer span of time that he has dealt with this
19 issue are all bases that the jury could use to find actual
20 damages for the plaintiff.

21 So, Your Honor, we believe that he should be allowed to
22 continue with his case and go to the jury on those issues.

23 THE COURT: All right, counsel, I will get you,
24 Mr. Manning, a ruling on your motion.

25 Gentlemen and lady, the jury is not due here until

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1 10:00. I did not want them waiting in the jury room while
2 we went over the motions. So we'll stand in recess until
3 10:00.

4 (Recess taken from 9:28 a.m. until 10:03 a.m.)

5 THE COURT: Good morning, everyone.

6 Mr. Manning.

7 MR. MANNING: Yes, Your Honor. Defendant will
8 call to continue his testimony from yesterday John
9 Ulzheimer.

10 THE COURT: Sir, would you come up. You're still
11 under oath.

12 **JOHN ULZHEIMER**, DEFENDANT'S WITNESS, RESUMED THE
13 WITNESS STAND

14 DIRECT EXAMINATION

15 BY MR. MANNING:

16 Q. Mr. Ulzheimer, we went through qualifications and
17 materials considered yesterday. One thing that I didn't ask
18 you about is on your report you say that you are FCRA
19 certified.

20 A. That's correct.

21 Q. What does that mean?

22 A. That's correct.

23 Q. What does it mean to be FCRA certified?

24 A. So the FCRA is the Fair Credit Reporting Act which is
25 the federal law that really governs how the credit reporting

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1 agencies and the companies that use credit information have
2 to operate vis-a-vis that type of information.

3 And the credit reporting agencies' trade association
4 actually has a, a training program and course that people in
5 the industry can take. And if they pass the test that comes
6 at the end of the course, then this organization confers the
7 designation FCRA certified.

8 I'm actually twice FCRA certified, once by an
9 association called the Associated Credit Bureaus, and then
10 once by an organization called the CDIA, the Consumer Data
11 Industry Association, which is currently the trade
12 association of the credit reporting agencies.

13 Q. Okay. So let's step back from the, from that. And
14 what is it good for? What do you use it for?

15 A. Sure. So the -- well, again, the Fair Credit Reporting
16 Act defines a variety of, of things that are very important
17 in not only my work as an expert witness in the world of
18 consumer credit, but also in the articles that I write about
19 people's rights regarding credit reports, the obligations
20 placed upon the credit reporting agencies and the companies
21 that furnish information to them, under what conditions are
22 credit reports allowed to be disclosed to third parties by
23 the credit bureaus.

24 And, so, essentially it's almost like the rule book, if
25 you will, regarding the use of credit reports and how -- you

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1 know, the consumer's rights, obviously, and how the credit
2 reporting agencies must act.

3 Q. You mentioned rule book. Are you aware of any credit
4 industry publication that defines what is required for a
5 reasonable investigation?

6 MR. YOUNG: Objection, Your Honor.

7 THE COURT: Basis?

8 MR. YOUNG: This witness has expressed no opinion
9 on reasonable investigation. He absolutely has expressed no
10 opinion. And now counsel is going to elicit information
11 about -- I mean about a reasonable investigation. And
12 counsel's trying to elicit information from this witness
13 about what needs to be done in a reasonable investigation.

14 THE COURT: My recollection is that we covered
15 this yesterday.

16 MR. MANNING: My, my question, Judge, "Are you
17 aware of any credit industry publication," is a factual
18 question.

19 THE COURT: Well, he can certainly testify to his
20 awareness of publications on the issue, but I think I
21 resolved yesterday, based on my review, that there wasn't
22 anything offered as an opinion about whether or not they
23 conducted a reasonable investigation.

24 And, so, if he wants to testify to his awareness of
25 those publications, he certainly can but not as to what

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1 constitutes a reasonable investigation.

2 MR. MANNING: I understand your ruling, Your
3 Honor.

4 THE COURT: Either from those publications or, in
5 this case, given the parameters set forth in Mr. Ulzheimer's
6 report. Anything further?

7 MR. YOUNG: No. Thank you, Your Honor.

8 THE COURT: Mr. Manning.

9 MR. MANNING: I'll re-ask the question.

10 BY MR. MANNING:

11 Q. Are you aware of any credit industry publication that
12 defines what is required for a reasonable investigation?

13 A. I am not. I've never seen any publication in my 25
14 years in this industry that defines what is a reasonable
15 investigation.

16 Q. Are you aware of any credit industry publication that
17 defines the type and nature of the dispute that the credit
18 bureau assigns to an ACDV that causes that to guide or limit
19 the investigation that the furnisher is to perform?

20 A. Yes, I am aware of a publication that defines that
21 process, including the codes and the placement on the ACDVs.

22 Q. What is it?

23 A. It's the e-OSCAR training manual and the -- I know I'm
24 speaking in industry code. But e-OSCAR is essentially the
25 communication protocol. Think of it as a phone line, if you

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1 will, between the credit reporting agencies and the
2 companies that furnish information to them. And it's, it's
3 called e-OSCAR.

4 And e-OSCAR is used not only by the credit reporting
5 agencies to send communication to their furnishers or their
6 customers, but also for the furnishers to send information
7 back to the credit reporting agencies.

8 And in the training manual there is actually a list of
9 dispute codes, not only the numeric value but also the plain
10 English language that shows up when someone from the credit
11 reporting agency enters that numeric value onto an ACDV.

12 Q. So, in other words, the e-OSCAR -- did you say
13 guidebook? Glossary?

14 A. Training manual.

15 Q. Training manual?

16 A. That's right.

17 Q. -- is the language that the furnisher and the credit
18 bureau are supposed to be using in the communication with
19 the ACDVs?

20 A. As it pertains to the dispute codes, yes.

21 Q. All right.

22 A. And which dispute code to use, meaning how do I know to
23 choose -- I know we've talked about 001 and 007 a lot in
24 this particular case. So how do we know when to use 001 or
25 how do we know when to use 007? That's part of the

1 training, the employee training procedures of the credit
2 reporting agencies.

3 Q. On Page 11 of your report you talk about -- you say
4 that that code guides or limits the investigative actions.
5 What do you mean by that?

6 A. Right. And so the, the dispute code -- the intent of
7 the dispute code is to clearly communicate to the furnishing
8 party, which is usually a bank or a collection agency or a
9 credit card issuer, what the consumer is challenging with
10 respect to their entry on a credit report.

11 And, so, the importance of the code is, A, clarity. I
12 need to know what you want me to investigate because the
13 consumer contacted you, not me. And then, two, it helps me
14 to essentially optimize my investigative actions.

15 For example, if someone asks me to, whether or not the
16 account is mine or not, I'm not going to go search out,
17 research the balance. That's, that's -- you know, that's
18 not a, that's not a, you know, a properly directed
19 investigation.

20 So it actually helps -- think of it as kind of like
21 road maps. It helps the furnishing party to look in the
22 proper systems and look for the proper fields and validate
23 the proper items with respect to what the consumer is
24 actually challenging.

25 Q. In this case there's been testimony about the Equifax

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1 credit report and what it shows. Have you actually seen an
2 Equifax credit report?

3 A. One of the documents we looked at yesterday was a, a,
4 what's referred to as a tri-merge or a credit report that
5 has information from all three of the credit reporting
6 agencies. So, yes, we looked at that. We looked at that
7 yesterday, in fact.

8 Q. Is it possible for -- so that tri-merge was something
9 that the plaintiff had?

10 A. Right. That's, that's formally referred to in the
11 credit reporting world as a consumer disclosure, meaning it
12 is information that is disclosed to, directly to the
13 consumer. It's not given to a bank. It's given only to the
14 consumer.

15 And that, that particular, I'll call it a product, that
16 particular product is an on-line deliverable. So that would
17 have been delivered through the internet.

18 Q. Are you aware -- of all those materials you listed
19 yesterday, are you aware in any of those materials whether
20 plaintiff ever provided a copy of that tri-merge report to
21 Ocwen at any point?

22 A. I didn't see anything suggesting that that credit
23 report had been provided to Ocwen, no.

24 Q. Is it possible that Ocwen could have somehow pulled
25 that credit report from Equifax itself?

1 A. The creditreport.com report that we looked at
2 yesterday?

3 Q. Yes.

4 A. No. That's, that's a consumer disclosure. That, that
5 is a consumer product. That is not something available to
6 companies that pull credit reports directly from the credit
7 bureaus, for example, for the purposes of underwriting a
8 loan.

9 Q. What, what about a credit report from one of the three
10 credit bureaus? Could Ocwen have pulled one of those?

11 A. They could not have.

12 Q. Why not?

13 A. Ocwen is not a lender. They're a servicer. So there's
14 a difference regarding what type of access a servicer has
15 versus what a lender has. And a moment ago you asked me
16 questions about what is the Fair Credit Reporting Act? What
17 does that mean? What is it?

18 And one of the, one of the sections of the Fair Credit
19 Reporting Act is called "Permissible Purpose." And
20 Permissible Purpose in English is essentially the list of
21 the conditions, under what conditions can the credit
22 reporting agencies disclose a credit report to a third
23 party.

24 And one of the reasons is not because we're doing an
25 investigation pursuant to a consumer dispute. That would be

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1 actually a violation of the Fair Credit Reporting Act if
2 they would have done so.

3 Q. So the suggestion that Ocwen should have pulled
4 Mr. Daugherty's credit is an invitation to violate the law?

5 A. That's exactly right.

6 Q. Are you familiar with plaintiff's claims in this case
7 that he was denied credit because of something on the
8 Equifax report or somehow connected to Ocwen?

9 A. Yes, sir, I am.

10 Q. And do you have opinions on that matter?

11 A. Yes, sir. They were actually part of my expert report.

12 Q. Okay. So I want to take these one by one. So are you
13 aware that plaintiff claims he was denied credit by Embrace
14 Loans --

15 A. Yes, sir.

16 Q. -- because of something that Ocwen did?

17 A. Yes, sir.

18 Q. Okay. Tell us what your investigation and analysis for
19 your report led you to conclude.

20 A. Do you mind if I have a copy of my report so I can go
21 off of it rather than -- because there were multiple of
22 those, you know, alleged denials and I just want to make
23 sure that I keep them straight.

24 Q. Of course.

25 A. Thank you. Give me a minute to find that.

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1 Q. Mr. Ulzheimer, I'm going to put it up on the screen.

2 A. Oh, okay.

3 Q. Is that what that is?

4 A. Yes.

5 Q. On Page 14 of your report you identify Embrace Loans
6 and you cite a couple documents.

7 A. Yes, sir.

8 Q. And I want to start just by -- what, what did you do to
9 investigate whether Mr. Daugherty's denial by Embrace Loans,
10 that credit application denial, was caused in any way or
11 related in any way to the Ocwen ACDV responses?

12 A. So all of my investigation was done based on a review
13 of -- well, relying upon my knowledge of the industry and
14 how applications and denials take place and, maybe more
15 importantly, why they take place, but also a review of the
16 materials that were produced to me in this case which
17 included credit reports and letters from these different
18 lenders.

19 Q. Okay. So specifically now with Embrace, Embrace Loans,
20 what did you, what did you review and determine?

21 A. So my review was, first off, the letter that came from
22 Embrace to Mr., Mr. Daugherty. And what I concluded was
23 that the, you know, the duplicative Ocwen account on
24 Mr. Daugherty's Equifax credit report did not play a part in
25 Embrace's decision to deny Mr. Daugherty credit.

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1 And the reason why, the reason why I came to that
2 conclusion is because Embrace Loans pulled Mr. Daugherty's
3 TransUnion credit report and Experian credit report. They
4 did not pull Mr. Daugherty's Equifax credit report, which
5 means they didn't even see the duplicative Ocwen account.
6 So it's systemically impossible that it was a basis for
7 their decision.

8 Q. How do you know that?

9 A. If -- well, when a lender pulls a credit report from
10 one of the credit reporting agencies, they only get the
11 credit report from that one credit reporting agency. So
12 I'll give you a hypothetical.

13 So if I go into a bank and I want to borrow money to
14 buy a car and that particular bank pulls Experian credit
15 reports and they pull my Experian credit report, they are
16 not seeing my TransUnion credit report and they are not
17 seeing my Equifax credit report.

18 So they're basing their decision, the credit reporting
19 component of their decision solely on the information that's
20 being provided by that one credit reporting agencies, or
21 credit reporting agency.

22 Q. How were you able to determine that Mr. Daugherty's
23 credit application didn't utilize either the Experian -- I'm
24 sorry -- only utilized Experian and TransUnion?

25 A. There was nothing to indicate that they received or

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1 even attempted to pull an Equifax credit report. However,
2 there was an indication that they pulled a TransUnion and an
3 Experian report.

4 Q. Is there any way that the Equifax reporting of the one
5 Ocwen account twice could have been a factor in the Embrace
6 Loans' denial of Mr. Daugherty's credit application?

7 A. No.

8 Q. The next credit denial Mr. Daugherty is claiming has to
9 do with a company called Quicken Loans. Are you familiar
10 with that credit application?

11 A. I, I am. Just for clarity, there was some production
12 that post-dates my report from Quicken. But, yes, I am --
13 which I reviewed. It was after I submitted my, this report.

14 Q. Uh-huh.

15 A. But, yes, I am familiar that Mr. Daugherty was denied
16 credit by Quicken.

17 Q. So I'm going to ask you to limit your testimony to your
18 report.

19 MR. YOUNG: Objection, move to strike the last
20 answer. The witness prefaced it by saying that it was
21 received after his report. The report's never been
22 supplemented. And it shouldn't -- he shouldn't be permitted
23 to discuss that with the jury.

24 THE COURT: Mr. Manning, any response?

25 MR. MANNING: He hasn't testified to that yet.

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1 There's -- he hasn't been asked anything about the Quicken
2 Loans process yet. So -- and I was just about to ask him to
3 limit his inquiry or his testimony to what's in his report
4 which is on Page 14.

5 THE COURT: All right. I overrule the objection.
6 Go ahead, please.

7 And I overrule it for the reason that he's not stated
8 any opinion with respect to it, Mr. Young.

9 Go ahead.

10 BY MR. MANNING:

11 Q. In your expert report, Mr. Ulzheimer, on Page 14 you
12 identify a Quicken Loans credit application by Mr. Daugherty
13 that was denied.

14 A. That's right.

15 Q. The documents that you reviewed as part of that opinion
16 for this report, what documents do you recall seeing?

17 A. It wasn't necessarily what I saw. It was what I didn't
18 see. A, a credit denial and a credit application are very
19 easy to memorialize. There is a paper trail a mile long
20 when these types of things take place.

21 And the lack of any documentation supporting an
22 application and a denial, which is exactly what I said in my
23 report, there are no documents suggesting the plaintiff ever
24 applied for a loan with Quicken or was denied a loan by
25 Quicken.

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1 Q. Okay. So you're, you're not aware of any evidence that
2 shows Quicken Loans at any point relied on Mr. Daugherty's
3 Equifax credit report?

4 A. No, sir.

5 Q. The next one you talk about in your report is Chase on
6 Page 13. There is a Chase credit card application. Do you
7 recall reviewing that, any documents related to that?

8 A. Yes, sir. There was a letter from Chase.

9 Q. Okay. And what reasons did Chase provide for the
10 denial of Mr. Daugherty's credit application for a credit
11 card?

12 A. So the Chase declination letter which is formally
13 referred to as a notice of adverse action, but we, we all
14 call them denial letters, the, the denial letter actually,
15 without even looking at it, it's got to include certain
16 attributes. The Fair Credit Reporting Act requires that it
17 includes certain attributes.

18 One of those is where did you get the -- well, if you
19 did get a credit report, where did you get it from? In
20 other words, they have to identify the credit reporting
21 agency that was the source of the information. That's
22 number one.

23 The letter also has to convey Mr. Daugherty's rights
24 with regards to getting a free copy of that report because
25 it was used as a basis for a denial.

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1 Number three, if a credit score was delivered as part
2 of the report, that credit score has to be included in the
3 letter, not, not a credit score, the credit score that was
4 used as the basis for the denial.

5 And then the letter also has to include at a high level
6 the reasons behind why the score is so low and the basis for
7 their decisions.

8 Q. I'd like to show you a copy of that letter. It's been
9 marked already as Plaintiff's Exhibit 7.

10 A. Okay.

11 Q. And this letter is already in evidence. It says,
12 "Thank you for your interest in our Disney Visa platinum
13 credit card." Is that right?

14 A. It -- that's right. Apparently Chase does the issuing
15 of the Disney Visa platinum credit card.

16 Q. Now, Mr. Daugherty testified that the, the only thing
17 that's being referenced here is the Ocwen account. Is that
18 consistent with your understanding of what is being
19 referenced in this letter and Mr. Daugherty's credit report?

20 A. No, that's, that's incorrect. The testimony that he
21 gave is incorrect. There's certainly other things that are
22 referenced here other than the duplicative Ocwen account.

23 Q. How do you know?

24 A. Well, I don't know if you can see what I'm pointing at,
25 but just below the first paragraph kind of indented towards

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1 the middle of the page --

2 Q. Yes.

3 A. -- Chase actually gives the specific reasons for their
4 denial. And clearly line one you could make a reasonable --
5 Mr. Daugherty didn't have a repossession or an early lease
6 termination on his credit report. So you can -- the
7 foreclosure is likely the duplicative Ocwen account on the
8 Equifax report.

9 But the second one, balances on accounts are too high
10 compared to credit limits. That doesn't have anything to do
11 with Ocwen. Ocwen is an installment mortgage loan. Credit
12 limits are on credit cards. It's completely meaningless
13 vis-a-vis Ocwen.

14 Q. Let's stop there for a minute.

15 A. Okay.

16 Q. The second reason for the denial, balances on accounts
17 are too high compared to credit limits.

18 A. That's right.

19 Q. Why can't that be a mortgage?

20 A. So let me tell you what that is. Balances on accounts
21 too high compared to credit limits is what's referred to as
22 the debt-to-limit ratio. And the debt-to-limit ratio is a
23 metric that credit scoring systems use to calculate a score
24 based on information regarding credit card accounts, so
25 plastic, credit card accounts on your credit report.

1 So what this actually means is that Mr. Daugherty's
2 balances on his credit cards were too close to the credit
3 limits on his credit card. So that ratio or metric was too
4 high in their mind to grant him this credit card, the Disney
5 Visa platinum card.

6 This particular metric does not consider installment
7 accounts, which is what a mortgage is. It only considers
8 revolving accounts; therefore, credit cards.

9 Q. Okay. So that's a separate and independent reason for
10 the denial?

11 A. It has nothing to do with installment loans, has
12 nothing to do with mortgages.

13 Q. Let's talk about the third one. "Your credit report
14 reflects delinquent past/present credit obligations." What
15 does that mean?

16 A. That suggests that Mr. -- we looked at his credit
17 report yesterday, so it kind of makes sense -- that
18 Mr. Daugherty's Equifax credit report as of the time that
19 they accessed it had delinquent past or present credit
20 obligations, which when we went through the inventory
21 yesterday we can see that there were quite a few of them.

22 Q. Now, let's scroll down to the second page.

23 A. And you may, you may see -- again, I know you can't see
24 what I'm pointing at. I referenced in my report that the
25 score was 561. And you can see right here this is a

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1 required disclosure of this letter, 561.

2 Q. Okay.

3 A. Yeah, that's right.

4 Q. Now, I've got to see if I can figure out how to --

5 A. I'm sorry about that.

6 Q. No, don't worry. That was neat. Okay. Let's go to
7 the second page, "primary factors that negatively affected
8 your credit score."

9 A. Right.

10 Q. What's being explained to Mr. Daugherty in this section
11 of the letter?

12 A. So the, the prior page, and that's why I brought that
13 up when they referenced the credit scores being a basis for
14 their decision to deny him that Visa credit card, the Disney
15 card, they also have an obligation to give the consumer or
16 the applicant, Mr. Daugherty, reasons why the credit score
17 isn't higher. And they're positioning it as primary factors
18 that negatively affected your score.

19 And, so, that's the inventory of reasons that they give
20 there. And sometimes you'll see four. Sometimes you'll see
21 five. In this letter Chase chose to disclose five reasons
22 why that 561 from the prior page wasn't a higher score.

23 Q. Which of these five reasons is consistent with your
24 testimony yesterday when you were telling us about how to
25 score someone's credit?

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1 A. Okay. So the first bullet point, that one --

2 Q. The delinquency?

3 A. Yep. So that's delinquency, public record, or
4 bankruptcy. So if we remember the pie chart that we talked
5 about yesterday, the five factors, the payment history was
6 the number one most important factor.

7 You may recall Mr. Daugherty's credit report had a
8 record of tax liens. Tax liens are public records. And you
9 can see right there that's a reference to public records.

10 Number two, length of time since last delinquency on
11 all accounts. That's a reference to delinquencies and
12 derogatory entries on credit reports. That's also in that
13 payment history, you know, chunk of the pie, if you will.

14 The third has nothing to do with derogatory credit
15 entries. This is the total available credit on revolving
16 accounts. And that's --

17 Q. What does that mean?

18 A. It's kind of not well-written. What that means
19 essentially is that Chase is concerned with the aggregate of
20 credit limits on Mr. Daugherty's credit cards on his Equifax
21 credit report. And, so, they identify that as a factor.

22 Q. Okay. Next?

23 A. Installment loans not paid as agreed compared to all
24 installment loans. This is -- this would be in that payment
25 history chunk of the pie.

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1 The fifth one, "request for new credit," you may recall
2 yesterday we talked about one of the smaller pieces of the
3 pie is the pursuit of new credit or inquiries. That's what
4 this last bullet point is regarding.

5 So these are all reasons why that 561 wasn't, you know,
6 a much higher score and that 561 was one of the reasons why
7 they denied him.

8 Q. Okay. So in light of this letter, what is your opinion
9 as to whether this duplicative Equifax account was a factor
10 in the denial?

11 A. It, it was not a factor in the denial. There are so
12 many other conditions that have absolutely nothing to do
13 with the duplicative tradeline on the Equifax report.

14 Q. Let's go to the next one. And if I flip to your
15 report, again Page 14, --

16 A. All right.

17 Q. -- I have Comenity Bank. This is a bill-me-later
18 account. Do you recall reviewing documents regarding a
19 bill-me-later account?

20 A. Yeah. It's a PayPal, a PayPal service.

21 Q. All right. So let's put this up for the jury. This is
22 Plaintiff's Exhibit 8.

23 A. All right. It's not up yet.

24 Q. So this is another credit denial. It's for a PayPal
25 account. I mean, I'm not really sure what that is. Is

1 it -- what type of credit is that?

2 A. So I'm not sure if you're familiar with PayPal, but
3 PayPal allows you to pay for things and receive money.

4 Q. Is it like a revolving account?

5 A. No. PayPal is just a service. So people use it a lot
6 of times to pay for things that they may purchase on e-Bay
7 or to send out invoices to clients and you can pay through
8 PayPal.

9 Bill-me-later is essentially an extension of credit
10 that PayPal offers to their clients. It's almost like a
11 credit card that doesn't really exist as a physical credit
12 card. That's a good way to think about it.

13 Q. Okay. So it's -- is that considered a revolving
14 account?

15 A. It would be.

16 Q. Okay.

17 A. Yeah.

18 Q. All right. I understand that. Now, in this letter --
19 is this one of the letters that you reviewed in preparation
20 of your report?

21 A. It is, yes, sir.

22 Q. Okay. What does this letter tell you about the reasons
23 why this bill-me-later credit through a PayPal account was
24 denied?

25 A. Yeah. So this is -- again, this is a notice of adverse

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1 action or denial letter, so it has to include a variety of,
2 of metrics or -- excuse me -- attributes to disclose to the
3 applicant. And as you can clearly see, they -- let's see.
4 I'm trying to find --

5 Q. Maybe we can blow up the top.

6 A. Yeah. That's one thing. No, maybe blow it down a
7 little bit. There we go. Okay. That's fine. So they,
8 they denied his request and they gave reasons.

9 Now, this one is a little bit more complicated. They
10 actually scored information off of his application, which is
11 different than just a credit bureau score. And they even
12 disclosed numeric value based upon the results of analysis
13 of credit histories of a large number of customers.

14 And then just below that, "The information you provided
15 in your application did not score a sufficient number of
16 points for approval."

17 So that has nothing to do with the credit report.
18 That's just information off of when you're filling out -- if
19 you can kind of think of yourself filling out a paper
20 application at a bank. The answers you give to a lot of
21 those questions, which are not credit report, that
22 information is actually scored as well. It's called an
23 application model.

24 So he was denied, first off, because of that which that
25 doesn't have anything to do with an Equifax report. But

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1 then when they actually did pull a credit report because
2 they use that as well as a basis, "too many accounts in your
3 credit file with serious delinquency," and, and clearly
4 identified a large number of those yesterday.

5 Q. And we don't need to go through those. That's the 11
6 other collection accounts?

7 A. Yeah, 11 collections, a couple tax liens. And if you
8 page down, you'll actually see the score. They have to
9 disclose the score. There it is, 580. And then the reasons
10 why the score wasn't higher.

11 You can see that they're very similar to the letter we
12 just looked at a minute ago from Chase. Serious
13 delinquency -- this actually contains two of them,
14 derogatory public record or collection. Both of those were
15 on Mr. Daugherty's Equifax credit report, tax liens and the
16 collections.

17 This is -- the next one is another way of saying the
18 same thing that we talked about a moment ago with regards to
19 balances on your credit cards being too close to the credit
20 limit, so that ratio being too high. Proportion of balances
21 to credit limits is too high on bank revolving or other
22 revolving accounts.

23 The third is "time since delinquency is too recent or
24 unknown." That's a pretty easy one to determine. That
25 means they feel like the delinquencies are too recent for

1 their comfort.

2 Number four is number of accounts with delinquency.

3 Thirteen -- too many inquiries in the past 12 months and
4 that's the pursuit of credit. So they're uncomfortable with
5 the fact that he's applying for credit so much within the
6 prior year.

7 Q. And when -- you said "13." What do you mean by that?

8 A. Oh, I'm sorry. The 11 collections, the two tax liens.

9 Q. So that's 13 totally separate and apart from the Ocwen
10 that Equifax is duplicating?

11 A. That's right. And I guess if you want to be kind of
12 hyper-accurate about this, the accurate representation of
13 the Ocwen account is my understanding did, in fact, have a
14 late payment on it.

15 So I guess you can, you can add that to the -- again,
16 we're beating a dead horse at this point. So, you know, 11
17 collections, two tax liens unrelated to Ocwen.

18 Q. Okay. Now, the next one I'd like to ask you about is
19 One Community Federal Credit Union. Do you recall
20 receiving --

21 MR. YOUNG: Objection, Your Honor.

22 THE COURT: Basis?

23 MR. YOUNG: Not covered or mentioned whatsoever in
24 the report.

25 THE COURT: Counsel, any response to the

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1 objection? I'm looking to the pages.

2 MR. MANNING: Yes, Judge, Page 13, second
3 paragraph -- I'm sorry -- third paragraph. "Plaintiff
4 suggests he was denied by Chase, Quicken Loans, Embrace, One
5 Community Federal Credit Union and GE acting on behalf of
6 Sandy Furniture. He was, however, provided no documents
7 from GE, Quicken Loans, Embrace Loans, or One Community
8 Federal Credit Union suggesting that he applied for credit
9 with them let alone was denied credit by them."

10 THE COURT: And what is your intended inquiry with
11 respect to that one?

12 MR. MANNING: Yes, Judge. I was going to just
13 start by asking him what information he reviewed, if any,
14 what he was aware of when he prepared this report regarding
15 the One Community Federal Credit Union.

16 THE COURT: All right. I will overrule the
17 objection to that question based on what I see here,
18 counsel. If there's a need as we go forward to impose
19 others, don't let that prevent you. But he -- I think it is
20 a fair interpretation of this paragraph that he considered
21 that. I don't know where the questioning is intended after
22 that. So if you want to impose objections, you can.

23 MR. YOUNG: May I point out, Your Honor, that the
24 "documents relied upon" portion of the opinion does not
25 include anything with respect to the loan mentioned.

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1 THE COURT: All right. I'm going to permit this
2 question. I overrule the objection. And we'll see where it
3 goes after this, counsel.

4 BY MR. MANNING:

5 Q. Let's, let's clarify that, Mr. Ulzheimer. Exhibit C on
6 your report has all the documents you relied upon. And we
7 went through all of them yesterday.

8 A. Right.

9 Q. I'm not going to ask you to read them all again. But
10 if we can just flip to Page 21 of the report, it includes a
11 number of things that the plaintiff provided. Plaintiff's
12 discovery responses -- I count seven separate discovery
13 responses. Do you recall there being documents attached to
14 those?

15 A. Yes.

16 Q. Okay. So what I'm asking you first is do you recall in
17 preparing this report seeing what you referred to as an
18 adverse action letter, meaning a letter in which One
19 Community Federal Credit Union actually denied Mr. Daugherty
20 a credit application?

21 A. I do, yes.

22 MR. YOUNG: Was the answer, "I do"?

23 THE WITNESS: I do, yes.

24 THE COURT: Yes, that was the answer.

25 BY MR. MANNING:

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1 Q. What, what document was that?

2 A. I believe it was -- I believe it was an --

3 THE COURT: Mr. Young, is there an objection?

4 MR. YOUNG: Your Honor, I object. There is no
5 such letter.

6 THE COURT: Well, we'll see. The witness has
7 indicated that he reviewed such a letter apparently. That's
8 my understanding of his response to Mr. Manning's question.
9 And let's go from there.

10 Go ahead, please.

11 MR. MANNING: I believe the witness is referring
12 to a Quicken Loans denial as opposed to a --

13 THE COURT: Well, I don't want you to testify.
14 You can ask him a question.

15 MR. MANNING: Okay. I'll ask, Judge.

16 BY MR. MANNING:

17 Q. I know you had already said there were things that were
18 produced in this case after your report --

19 A. Right.

20 Q. -- which you reviewed.

21 A. Right.

22 Q. And I'm not going to ask you what they are --

23 A. Okay.

24 Q. -- or ask you to offer an opinion about them. I'm just
25 trying to get at specifically in your report the documents

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1 that you reference. And in your report you have Quicken
2 Loans. You don't recall seeing -- or at the point of the
3 report, you don't recall ever seeing a Quicken Loans denial?

4 A. Correct.

5 Q. Okay.

6 A. At the point that I wrote the report.

7 Q. Right.

8 A. That's right.

9 Q. Which was May 13th, 2015?

10 A. Last year, that's right.

11 Q. Yeah, a year and a week.

12 A. Uh-huh.

13 Q. So what about -- in your report is there any reference
14 to an adverse action denial letter from One Community
15 Federal Credit Union?

16 A. There is not.

17 Q. Does that refresh your memory as to whether you ever
18 saw one?

19 A. Well, again, limited to the report, there was no denial
20 letter prior to me writing this report that I ever saw from
21 One Community.

22 Q. Okay.

23 MR. YOUNG: Objection, Your Honor. This witness
24 has sworn that there was such a letter and now has sworn
25 that such a letter doesn't exist.

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1 MR. MANNING: That's inaccurate.

2 THE COURT: Well, that's not an objection -- an
3 evidentiary objection. That's an issue in terms of the
4 jury's consideration of credibility, counsel. He --
5 witnesses often testify inconsistently. It will be up to
6 the jury to weigh that as they weigh all of the evidence in
7 this case.

8 MR. MANNING: Thank you, Judge.

9 BY MR. MANNING:

10 Q. Have we gone through all five of the issues that
11 Mr. Daugherty is claiming as credit issues?

12 A. Chase, Quicken, Embrace, One Community. I think the
13 one missing was GE acting on behalf of Sandy Furniture.

14 Q. Okay. So what's, what's GE acting on Sandy -- on
15 behalf of Sandy Furniture?

16 A. What does that mean?

17 Q. Yeah. I don't know what that is.

18 A. It's not uncommon for retailers like -- and I'm, I'm
19 assuming Sandy Furniture is a furniture store or a furniture
20 retailer. We don't have them in Atlanta, so I'm not
21 familiar with them. And it's not uncommon for retailers to
22 have financing relationships with lenders so that when
23 customers come in and want to buy a piece of furniture
24 that's really expensive, they can actually finance it.

25 And, so, rather than someone like Sandy Furniture

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1 extending credit because that's not what their business is,
2 I assume they're just a furniture store, they can actually
3 submit an application to their financing partner, in this
4 case GE. And GE has a GE Capital division that does extend
5 credit.

6 Q. All right. So do you recall -- that wouldn't be a
7 mortgage, right, --

8 A. No. That would be --

9 Q. -- or mortgage application.

10 A. That would be a short-term installment loan to pay for
11 an expensive piece of furniture.

12 Q. And there were -- we talked yesterday about the
13 credit -- what did you call it? A tri-merge report from
14 creditscore.com?

15 A. That's right.

16 Q. And that -- would that include the, any discussion of
17 Sandy Furniture or GE on behalf of Sandy Furniture?

18 A. No. The credit reports don't, don't contain a record
19 of denials of credit. So any of these denials wouldn't be
20 memorialized on a credit report. There's no section of a
21 credit report that says, you know, "Mr. Jones was denied
22 credit from these two lenders." So, no, that denial would
23 not be memorialized on a report.

24 Q. Okay. You also in your report -- this is again at the
25 back, Exhibit C -- have the report of Evan Hendricks listed.

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50

1 A. Yes.

2 Q. And you, you've testified that the reason this was
3 caused was because Equifax misinterpreted the open date that
4 Ocwen corrected as a new account.

5 A. And created the duplicative tradeline, that's right.

6 Q. What was Mr. Hendricks's opinion on that matter?

7 A. I recall his opinion being that the root of the problem
8 started because of Equifax creating this duplicative
9 account. And I may be paraphrasing his testimony, or his
10 opinion in his report. But I, I believe that accurately
11 captures his opinion.

12 Q. So at least on that point, the cause of this whole
13 issue, you and Mr. Hendricks agree?

14 A. We are in total agreement on that issue, that's
15 correct. I also believe that Equifax misinterpreted the
16 opening date and, therefore, caused a duplicative tradeline.

17 Q. Now, after reviewing all of the materials and the
18 alleged credit denials and Mr. Daugherty's claims, based on
19 your 24 years of experience, including six years at Equifax
20 and seven years at FICO, what is your expert opinion on
21 whether Ocwen caused any damages to plaintiff?

22 A. I, I'm of the opinion that they did not.

23 Q. Thank you, sir.

24 A. You're welcome.

25 MR. YOUNG: Your Honor, I'd like to approach on a

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1 request to strike certain testimony.

2 THE COURT: All right.

3 (Bench conference on the record)

4 MR. YOUNG: Your Honor, I move to strike the
5 testimony of this witness wherein he testified that Ocwen is
6 not permitted by law -- is not permitted by the Fair Credit
7 Reporting Act to obtain a copy or to check the Equifax
8 information or data because it is not a permissible purpose.
9 That's what he unequivocally told the jury.

10 First, there is no such opinion set forth anywhere in
11 his report. He never opined that Ocwen can do it.

12 Moreover, it goes directly to whether or not Ocwen did
13 a reasonable investigation which this Court has repeatedly
14 admonished counsel not to go there. He went there anyhow.
15 The testimony is absolutely contrary to the Fair Credit
16 Reporting Act.

17 But we don't even need to get there. I can show you
18 the statute which says this is absolutely permissible
19 purpose. But that testimony that Ocwen can't do it, one is
20 it is not in his report. Two, it goes to the issue that
21 we've already prevailed on. That is the reasonableness of
22 the investigation.

23 But if I need to go further, I can show the Court the
24 statute. And if we don't get the curative instruction or
25 the exclusion, then I'm left with putting the law up there

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1 on the screen and debating the law with this witness.

2 THE COURT: All right. Any response, Mr. Manning?

3 MR. YOUNG: I have the cite here. I can further
4 cite directly to the statute.

5 THE COURT: All right.

6 MR. YOUNG: If I cite specifically to the statute,
7 it would be 1681b(a)(3)(A) which says that it's a
8 permissible purpose to review collection of an account of
9 the consumer. Moreover, they can get the information under
10 sub-capital (F), "otherwise has a legitimate business need
11 for the information," and specifically, "to review an
12 account to determine whether the consumer continues to meet
13 the terms of the account." That's what the law says. He's
14 wrong on the law.

15 I, I would like it stricken and the jury instructed to
16 disregard, Your Honor, because he gave no such opinion. And
17 it clearly goes to whether or not Ocwen did a reasonable
18 investigation, which this Court has repeatedly upheld my
19 objection.

20 THE COURT: Mr. Manning.

21 MR. MANNING: Thank you, Judge. My -- I'm sorry.
22 I always talk too loud.

23 My first response is there was no timely objection.
24 That's his obligation to timely object. If he wanted to
25 keep the testimony out, it's his obligation to object in a

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1 timely manner. And under the rules, if you don't it's
2 waived.

3 Number two, it is disclosed in the report on Page 5 of
4 his FCRA certification and what he utilizes it for, how he
5 obtains it. It's relevant to his experience and his
6 knowledge.

7 Number three, Page 9 talks about the hard inquiry pull.
8 That's when he talked about the difference between a soft
9 pull and a hard pull. His language is a little bit
10 different. He calls it a soft inquiry and a hard inquiry.
11 But he goes on to describe all of that at length.

12 There's no failure to disclose this. This is clearly
13 within his report. And there's quite a bit of discussion
14 about it. You notice he says "lenders can pull credit."
15 And he identified that Ocwen is not a lender and, therefore,
16 could not pull credit.

17 THE COURT: Point that out to me. "His inquiries
18 are visible to lenders and credit scoring." That is on Page
19 9. Is that where you are talking about?

20 MR. MANNING: Yes, Judge.

21 THE COURT: Then he refers to it as a soft
22 inquiry.

23 MR. MANNING: Okay. The soft inquiry up at the
24 top of the page goes on to discuss there are several types
25 of soft inquiries and what those mean and how they're

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1 utilized.

2 And then he goes on to talk about hard inquiries and
3 how they can have an impact on his trustworthiness. And it
4 says they're visible to lenders, and he's identified that
5 Ocwen is not a lender and they're not a credit scoring
6 company.

7 And these inquiries usually result from a lender
8 requesting a consumer's credit report when the consumer
9 applies for a credit card or a bank loan. Hard inquiries
10 can but, --

11 THE COURT: Excuse me, gentlemen. Go ahead.

12 MR. MANNING: -- but do not always affect the
13 borrower's credit score. And then -- so this is, this is
14 all -- they're on notice of all these issues, Judge.

15 THE COURT: Okay. That's Page 9. Point out to me
16 the language that you refer to on Page 5.

17 MR. MANNING: Yes, Judge, the certification at the
18 top, --

19 THE COURT: Uh-huh.

20 MR. MANNING: -- paragraph D. "I have been an
21 FCRA certified by the credit reporting --" these are the two
22 organizations that he identified. And he says it was
23 developed to prepare consumer reporting agencies and
24 companies that furnish information to the consumer reporting
25 agencies to meet -- and then what does he say -- the

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1 baseline requirements set forth in the FCRA.

2 That's exactly what he's talking about on the stand.

3 The course covers -- and he goes on to describe how consumer
4 credit grantors and those who use and furnish information to
5 consumer reporting agencies are affected by the FCRA.

6 THE COURT: All right.

7 MR. MANNING: It's all there, Judge.

8 THE COURT: As I understand it, Mr. Young, I want
9 to make sure that I am getting to the portion of the
10 testimony that you are asking to be stricken. It's that
11 portion of the witness's testimony where he indicated Ocwen
12 could not as a furnisher obtain a credit report. Is that
13 correct or not?

14 MR. YOUNG: That is correct. But he said it
15 was -- that the law did not permit it, that the --

16 THE COURT: I understand. That opinion, counsel,
17 is not included in what you have pointed to, Page 5 or Page
18 9. I do not believe, and I specifically find, that that
19 language, Mr. Manning, doesn't put an opposing party on
20 notice that that is an opinion that the expert is going to
21 give.

22 There are statements here in very general terms as to
23 when he's talking about soft and hard inquiries as to what
24 those are. And in telling what those are, he talks about in
25 general terms and as examples who make those requests and

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1 whether they are hard or whether they are soft. And on Page
2 5 in terms of his certifications it's even less there.

3 I find that the opinion that it is not permitted by law
4 is, in fact, not included in the report, and I'm going to
5 order that the jury disregard it, preserving Ocwen's
6 objection and exception. And I do so because I find that
7 it's not been disclosed.

8 Had it been disclosed, even if it was incorrect by law,
9 it would have put you, Mr. Young, in the position of
10 cross-examining him and impeaching him. I would have
11 permitted that. But being that it's not disclosed, I'm not
12 going to permit that opinion.

13 MR. YOUNG: Understood, Your Honor.

14 THE COURT: Thank you.

15 (Bench conference concluded)

16 THE COURT: Ladies and gentlemen of the jury, you
17 heard Mr. Ulzheimer give testimony regarding it not being
18 permitted by law. And I believe he was specifically
19 questioned that he would be entitled -- or Ocwen would be
20 invited to violate the law if they sought to obtain the
21 credit report.

22 I am ordering that you disregard the witness's
23 testimony in that, as to that issue. I'm ordering it
24 stricken from the record and that you make it no part of
25 your deliberations whatsoever.

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1 All right. Is there cross-examination of this witness?

2 MR. YOUNG: There is, Your Honor. Thank you.

3 CROSS EXAMINATION

4 BY MR. YOUNG:

5 Q. Mr. Ulzheimer, I looked at your website. You have an
6 FCRA website. Isn't that true?

7 A. I have a variety of websites, yes.

8 Q. Well, let's talk about your FCRA website.

9 A. Which one? There are multiple FCRA websites. I don't
10 know which one to which you're referring.

11 Q. FCRAexpertwitness.com.

12 A. Okay. Thank you.

13 Q. And on that website you have a list of recent cases in
14 which you offered expert testimony. Is that your
15 recollection?

16 A. I know what you're talking about, but it's not a list
17 of recent cases where I offered testimony.

18 Q. Okay. Well, --

19 A. I'm happy to tell you what that is if you'd like me to.

20 Q. I'll just show it to you.

21 A. Okay. Thank you.

22 Q. Do you see where it says "FCRA" -- what does it say on
23 the website?

24 A. I've got to blow it up. It's basically a list of cases
25 where I was an expert for the defense and another tab where

1 I was an expert for the plaintiff. And this is grossly
2 outdated.

3 Q. Well, I found the list where you testified as an expert
4 on behalf of the defense, and I counted 47 cases where you
5 testified as an expert for the defense. Is that what your
6 website represented at that time?

7 A. I'm -- yes. Again, that's grossly outdated, both
8 sides, the plaintiff and defense list. I can't even
9 remember the last time that's been updated, maybe -- many
10 years.

11 Q. Okay. So it's much higher in terms of defense. And if
12 we look at plaintiffs, it should be much higher also?

13 A. Correct. Yeah, the aggregate is going to be 230 cases,
14 give or take. And if you add up the two, the cases listed
15 under both tabs, I don't think you're going to get to
16 anywhere close to that number.

17 Q. Okay. Is it split fifty-fifty maybe?

18 A. As of --

19 Q. As of today.

20 A. No. If you took, if you took the total of all of the
21 expert witness work that I've ever done, then I would say
22 that it is -- and I haven't done this exercise in a while so
23 I'm giving you my best estimate. I would say probably
24 75 percent defense, 25 percent plaintiff.

25 Q. But your website holds out to the -- even though it's

1 outmoded, the website that's still out there says
2 fifty-fifty defense versus plaintiff, doesn't it?

3 A. That's right. At the time, that was a more accurate
4 distribution.

5 Q. But, for example, if I had a credit issue, I could
6 contact you and if I was willing to pay your retainer, I
7 could get your expert advice on a consumer issue, couldn't
8 I?

9 A. You could certainly contact me. I would have to do a
10 conflict check. But certainly you would be welcome to
11 contact me.

12 Q. And your rate is \$425 an hour?

13 A. Correct.

14 Q. Okay. Is there a minimum retainer of three hours?
15 Four hours? Something like that?

16 A. The way I structure my agreements is a \$7,500
17 refundable retainer. So if you use \$1,000 of, of,
18 quote/unquote, work, then I would end up writing you a check
19 back for \$6,500. It's not a, it's not a gift.

20 Q. Right. So to hire you and have you tell me whether or
21 not you could help me with a consumer credit issue, I'd have
22 to give you the materials and send you \$7,500. You'd do a
23 conflict check. And at that point, you may or may not be
24 able to help me. Is that fair?

25 A. No, the order -- the chronology of events that you just

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1 laid out is not at all what I do.

2 Q. Okay. Well, lay it out correctly.

3 A. Okay. So if you contacted me, the first thing I would
4 do before we even had a substantive discussion about
5 anything would be a conflicts check. So I would ask for you
6 to -- regardless of whether you're representing a plaintiff
7 or a defendant, it doesn't matter, I would need to know who
8 the parties are that are involved just to make sure that I
9 don't have any conflicts.

10 And, so, let's say that we get past that conflicts
11 step. Then we would have a substantive discussion about --
12 and that would, frankly, be something that you would lead
13 because you would be representing somebody and you would
14 explain to me the facts of the case.

15 And then based on our discussion, I would tell you,
16 "This is something I can't help you with because it's either
17 something that's not in my ballpark of knowledge," or, "Yes,
18 this is something that I could help you with."

19 And if you and I agree to terms, meaning that you're
20 okay with my retainer agreement and fees and such, I would
21 send you a retainer agreement that we would both execute.
22 And once all that administrative work has been taken care
23 of, then generally the next step would be that you -- well,
24 you would also give me a calendar, meaning we have an expert
25 report due on this date. Check your calendar. Is that

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1 something you can even do? We have trial on that date. How
2 does your calendar look? Can you even be at a trial
3 somewhere else on that date?

4 So let's assume that all of those things are thumbs up.
5 Then generally what happens next is you would provide me
6 with materials that either you feel I would need to do my
7 work or that I asked you for because I feel like I would
8 need them to do my work. And then we would proceed.

9 Q. Well, I'm an attorney but I'm also a consumer. If I
10 wanted to hire you to help me with a --

11 A. Okay.

12 Q. -- with an issue that I was having over credit
13 reporting, could I hire you?

14 A. My apologies. I thought you were asking in the
15 attorney/expert witness scenario, not just a consumer
16 calling John for help scenario. You could call me but we
17 wouldn't have a discussion because that's not a service that
18 I offer.

19 Q. You don't help consumers solve credit problems?

20 A. Not on an individual contract fee basis type of
21 scenario. That's actually illegal in Georgia where I live
22 to do something like that. I can write a book. You can buy
23 a book and read about how to do that. But, in other words,
24 Mr. Young hiring John Ulzheimer to sit down and look at your
25 credit report and tell you, you know, in exchange for money

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1 what you can do to improve your credit, that's, that's
2 called credit repair and that's illegal in Georgia and I
3 don't do it.

4 Q. Can I retain you as an expert if I represent a client
5 who has an absolute false, wrong entry on his credit report
6 that he can't seem to get fixed? As an attorney, can I
7 retain you on behalf of my client to get your advice on how
8 I can fix that?

9 A. As an attorney/expert witness type of relationship?

10 Q. Yes.

11 A. Yes, assuming we don't have conflicts and assuming that
12 everybody is agreeable to the terms of my retainer
13 agreement, then absolutely you can.

14 Q. And once this case is behind you, could I hire you to
15 help out one of my clients that can't seem to get an Equifax
16 report fixed, or is that a conflict?

17 A. In litigation or just as credit repair?

18 Q. Credit repair.

19 A. Credit repair is illegal in the State of Georgia. I do
20 not do credit repair.

21 Q. Litigation.

22 A. If, if -- well, I wouldn't be able to help you. I
23 don't -- I choose not to take cases against the credit
24 bureaus because I blog for some of them from time to time.
25 So I would be conflicted out. But if there was no conflict,

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1 then certainly that would be a type of expert
2 witness/attorney relationship that I would consider.

3 Q. So all the -- you're conflicted out of all, anything
4 involving a claim against a credit reporting agency; right?

5 A. Because I have existing relationships, that's correct.
6 I consider that to be a conflict.

7 Q. Do you blog for Equifax?

8 A. I blog for several of the consumer reporting agencies,
9 not Equifax specifically.

10 Q. Do you have a conflict if I tried to retain you in a
11 credit reporting issue involving a furnisher?

12 A. So you're suing a -- like in this case you're suing a
13 furnisher? I absolutely take cases like that. It, again,
14 would depend on who the furnisher is as to whether or not
15 I'm conflicted out.

16 Q. And you've been an expert witness on behalf of the
17 plaintiff in cases against furnishers, haven't you?

18 A. I have, yes, many times.

19 Q. But with this case behind you, would you have a
20 conflict with Ocwen?

21 A. If the -- I have other cases where I'm an expert
22 witness on behalf of Ocwen. So it, it seems like a
23 conflict. Even though this case would be over, there would
24 still be a conflict going forward.

25 Q. So you're not only an expert witness for Ocwen in this

1 case. You're an expert witness for Ocwen in other cases.

2 Is that right?

3 A. Yes, sir, two others.

4 Q. Involving Fair Credit Reporting Act issues; right?

5 A. Say that one more time. I'm sorry.

6 Q. Involving Fair Credit Reporting Act issues.

7 A. Yes.

8 Q. When you've served as an expert witness on behalf of
9 plaintiffs who have claimed injuries or damages from bad
10 credit reporting or false credit reporting, you've given
11 testimony about some of the things that can -- some of the
12 damages that a consumer can have when their credit is
13 falsely reported, haven't you?

14 A. Are you -- I don't recall that specifically.

15 Q. Well, let's shift gears here.

16 A. Okay.

17 Q. How can -- as an expert of all these years in this
18 field, tell the jury how a false, bad credit mark on your
19 credit history can hurt a consumer.

20 A. I could think of -- I mean, I can cherry-pick scenarios
21 or craft a very specific scenario for you where a
22 legitimately false piece of information that's derogatory
23 could cause a lower credit score. So that's certainly
24 something that can make it harder for a consumer to, you
25 know, to do what they want to do with lenders for example.

1 That's a good example.

2 Another one could be a false piece of information on a
3 credit report causing a lower credit score. That could lead
4 to a higher insurance premium because insurance companies
5 use credit reports and credit scores as well.

6 There are some scenarios where employers will pull a
7 credit report as part of the pre-employment screening
8 process. And if they see -- this isn't a credit score based
9 issue. It's a credit report based issue. But there's a
10 possibility you could come up with a, you know, kind of
11 cherry-pick an example where a piece of information on a
12 credit report could cause an employer to question whether or
13 not they wanted to hire a, an applicant or promote an
14 applicant. That's another example. They could be --

15 Q. I don't mean to interrupt you. Go ahead.

16 A. No, no, go ahead. I think another scenario would be if
17 you were approved for a loan, you could get a higher
18 interest rate. So you could have to pay more for, you know,
19 higher interest rate on a credit card for example.

20 Q. So, sir, if I had a big false foreclosure black mark on
21 my credit -- assume for the purpose of my question that I
22 have a big false foreclosure black mark on my credit. It's
23 going to hinder me in getting new credit, isn't it?

24 A. No. It's not as clean as just saying it is going to
25 hinder me. We've looked at letters in this case where

1 clearly it didn't.

2 Q. This is -- an example, the hypothetical is me and I'm
3 absolutely current on my mortgage and I have a big false
4 foreclosure black mark. That's going to hinder me in
5 obtaining credit, isn't it?

6 A. Again, that's -- your hypothetical is missing so many
7 required attributes that I, I can't answer "yes" or "no" to
8 that. And I don't know what a big false black mark --
9 there's nothing in my world that identifies anything on a
10 credit report as being big or black. So I don't, I don't
11 know. That doesn't make -- to me that doesn't make any
12 sense.

13 Q. Well, because you're an expert in this field and you
14 use words like "derogatory" and things like that. But to
15 me, a layperson, if I have a foreclosure that's absolutely
16 wrong on my credit that shows I'm \$6,000 behind and I'm out
17 there trying to re-fi my mortgage, I'm going to have
18 trouble, aren't I?

19 A. There's a possibility, yes. There's also a
20 possibility, no.

21 Q. And if I get someone that's going to lend me money with
22 a big false foreclosure black mark on my credit, I'm going
23 to pay more for that credit than I would than if that big
24 false foreclosure black mark wasn't there. Isn't that true?

25 A. There is a possibility, yes, and there's a possibility,

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1 no. It's not as clean as just saying "yes."

2 Q. Okay. And you already mentioned this could keep me
3 from getting a job if, if an employer pulled my credit and
4 sees that I don't pay my mortgage payment, --

5 MR. MANNING: Objection to relevance.

6 BY MR. YOUNG:

7 Q. -- that I haven't paid my mortgage payment.

8 THE COURT: What's the objection?

9 MR. MANNING: Relevance.

10 THE COURT: Just a minute.

11 MR. MANNING: Relevance.

12 THE COURT: Response to the relevancy objection?

13 MR. YOUNG: It's well within the scope of the
14 direct testimony. I'm cross-examining this witness to
15 determine -- in this particular case I already asked about a
16 job and now I don't recall what I was asking.

17 THE COURT: As I understand it, Mr. Manning, this
18 questioning about the big false --

19 THE WITNESS: Foreclosure black mark.

20 THE COURT: -- foreclosure black mark and whether
21 or not that hinders someone's ability to obtain credit is
22 questioning about the witness's opinion that he gave that no
23 one issue is determinative of whether one obtains credit or
24 not.

25 MR. MANNING: I have no problem with that, Judge.

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1 His question was this big false black mark foreclosure will
2 keep me from getting a job.

3 THE COURT: All right.

4 MR. MANNING: And my objection is relevance.

5 THE COURT: As to the job issue.

6 MR. MANNING: That's right.

7 THE COURT: Well, I would sustain that objection,
8 hearing no response.

9 BY MR. YOUNG:

10 Q. It can hurt me in applying for credit. And if I get
11 credit, I may have to pay more for it. Correct?

12 A. That's a possibility.

13 Q. And you already mentioned that credit can even impact
14 the insurance premiums I pay like for my automobile
15 insurance; right?

16 A. Credit can be a factor in both homeowners and auto
17 insurance premiums, that's correct, yes, sir.

18 Q. And if I want to rent an apartment for my daughter in
19 college, if someone pulls my credit this could affect
20 whether or not I even can rent an apartment for my daughter.

21 A. That's a possibility, yes, sir.

22 Q. If I go try to get a loan to buy property and I have
23 this big false foreclosure black mark showing I am currently
24 in default, five or more payments, \$6,000 in default, I'm
25 going to have trouble getting a real estate loan, aren't I?

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1 A. That's a possibility. Maybe yes, maybe no.

2 Q. Now, if I look at my credit and I see this big false
3 foreclosure black mark on my credit, is it understandable
4 that I might be upset when, in fact, I am current and
5 haven't missed a payment in the last year?

6 MR. MANNING: Objection, scope.

7 THE COURT: Response to the scope?

8 MR. YOUNG: Your Honor, the witness testified as
9 to damages or lack thereof with respect to the credit
10 reporting and I'm exploring that area.

11 THE COURT: All right.

12 MR. MANNING: Not on emotional damages. He's not
13 an expert on emotional damages.

14 THE COURT: No, he is not an expert on emotional
15 damages. But one of his opinions was that this issue had
16 not harmed the defendant. And I'm going to permit it,
17 preserving Ocwen's objection and exception for that reason.

18 Go ahead, please.

19 BY MR. YOUNG:

20 Q. So if I'm blameless and I find out this is on my
21 credit, it's understandable that I might get upset; right?

22 A. You're asking me a question outside of what I'm
23 knowledgeable about. I'm not clinically trained in any way.
24 But, I mean, I guess.

25 Q. Would you be upset, sir, if your mortgage was current

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1 and you pulled your credit and you saw that it said you were
2 in foreclosure, five or more months behind, and you were
3 \$6,000 delinquent? That would upset you, wouldn't it, sir?

4 A. If it was incorrect, that would upset me, yes.

5 Q. And it would be -- you would set out trying to fix
6 this, wouldn't you, if you saw this and it was absolutely
7 wrong? You would set out trying to fix it, wouldn't you?

8 A. Yes. I can speak for myself personally. I -- because
9 of what I do for a living, yes, I understand what my rights
10 are and how I would get something like that corrected.

11 Q. You could fix it in a matter of a few minutes, couldn't
12 you?

13 A. No. Unfortunately, the system isn't quite that nimble.
14 I could certainly figure out what my next steps would be
15 fairly quickly. But as far as getting it corrected in a few
16 minutes, that's, that doesn't happen in the dispute
17 resolution world.

18 Q. Well, it probably was exaggerated when I said a few
19 minutes. But I was reading one of your articles, "How Long
20 Does it Take to Correct Credit File Errors?" That's an
21 article you wrote and published on your website; right?

22 A. I, I've written so many that I don't have them
23 inventoried, but that sounds like an article I would
24 absolutely write. So I will concede that I have written
25 that, about that topic probably many times.

1 Q. Well, I'm just -- I want to ask you about this specific
2 one, so let me just show you the blog that I found under
3 your name by Googling it.

4 A. Okay.

5 Q. I want to ask you about this one. Go ahead and review
6 it.

7 A. I got it. You can, you can proceed.

8 Q. Okay.

9 A. Well, I don't have it memorized. If you're going to
10 ask about it, can I keep it so I can --

11 Q. Well, I need to ask the question but I'll hand it right
12 back to you.

13 A. Okay, fair enough. Okay.

14 Q. Well, the title of the article is "How Long Does it
15 Take to Correct Credit File Errors?" And you wrote it. And
16 the first numbered paragraph, "In some instances, it can be
17 done in a couple of days." Is that right?

18 A. Yes.

19 Q. "There's this process called Rapid Update." Right?

20 A. That's right.

21 Q. And the major credit unions you say could probably --
22 with this Rapid Update fix the credit file in 24 to 72
23 hours.

24 A. So you mean credit bureaus, right, not credit unions?

25 Q. I'm sorry.

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1 A. That's okay. I just want to make sure we keep a clear
2 record.

3 Q. At that Paragraph Number 1.

4 A. Yeah, Rapid Update is a product offered by mortgage
5 lenders where they will, for a fee, take a consumer's
6 dispute directly to a special department with the credit
7 bureaus kind of outside of the normal dispute resolution
8 process.

9 And as funny as this is going to sound, they can
10 actually pay the credit bureaus to prioritize their dispute
11 because the consumer has a loan pending. And you can
12 actually pay the credit bureaus to, for them to correct one
13 of their errors faster than, say, a garden variety dispute
14 that wouldn't go through the Rapid Update process.

15 Q. So in that respect, money talks, so to speak, if you
16 want to try to get something fixed in a hurry; correct?

17 A. Rapid Update is not a free -- some people call it Rapid
18 Update. Some people call it Rapid Rescore. It's
19 essentially the same thing. But there is a fee involved for
20 Rapid Updating.

21 Q. Is there any doubt in your mind, sir, that if your
22 mortgage payment was absolutely up-to-date and current and
23 you had a foreclosure shown on your credit, five or more
24 months in default, over \$6,000 owed, is there any doubt in
25 your mind, sir, that you couldn't have that fixed in 24 to

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1 72 hours with all of your expertise?

2 A. Oh, sure. I mean, I, I have contacts at the credit
3 bureaus. And so I, I would be able -- if I had an incorrect
4 item on my credit report, which regardless of whether it's a
5 big false foreclosure black mark or a big false collection
6 black mark or any other big false marks, I wouldn't go
7 through the normal consumer dispute process.

8 I would go directly to the people that I know who work
9 for the credit bureaus and tell them, "Please fix my
10 credit." It's not something that any consumer can do. But
11 because I -- what I do for a living, I would suggest to you
12 that I have a back door to getting something like that
13 corrected pretty quickly.

14 Q. How about the average guy on the street? He doesn't
15 have that key to that back door, does he?

16 A. He does not. His fastest option would be -- or he or
17 she's fastest option would be this Rapid Update process.
18 And, of course, there's, there are fees involved with that.
19 So it's not something that I would always suggest.

20 Q. Well, if you didn't have contacts and sources and a key
21 to the back door, would it be fair that if you wrote a
22 letter to your mortgage company and said, "Hey, I'm
23 absolutely current and you're showing me in foreclosure,
24 five or more payments past due, \$6,000 delinquent," you
25 would expect that to be fixed, wouldn't you?

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1 A. That would be my expectation, yes. I would like to
2 think that sending a letter to the company that -- I mean, I
3 would probably incorrectly make the assumption that they
4 would be the ones who did it. But I would certainly expect
5 that my letter would be sufficient.

6 And I would also probably file a dispute with the
7 credit bureaus concurrently just because, to burn the candle
8 at both ends.

9 Q. Okay. But when you make that direct dispute right to
10 the mortgage company, the people that own your mortgage,
11 that's a, that's a direct dispute; right?

12 A. That is a direct dispute, yes, sir.

13 Q. And when you make that direct dispute, your mortgage
14 company is required to put an XB code on your credit report
15 that you're disputing this; right?

16 A. That's correct.

17 Q. And when Mr. Daugherty sent a letter saying on
18 March 13th, 2013, which was received on March 14th, 2013, by
19 Ocwen and said that, "My loan is current but it's showing me
20 in foreclosure and \$6,000 in default," that's when Experian
21 was required to put an XB code on his loan; right?

22 A. Experian would only be required to pay --

23 Q. I, I completely fouled that up. When Ocwen got that
24 letter disputing this foreclosure that was absolutely false,
25 Ocwen is required by law to put an XB code on this account;

1 correct?

2 A. That's right.

3 Q. The month that they get it, they have to put that XB
4 code on it; right?

5 A. Yes. They have a reasonable amount of time to place
6 the XB code on the tradeline that they are reporting to the
7 credit reporting agencies because it's actively in dispute
8 at that point.

9 Q. Well, if they get the letter March 14th, by May 14th
10 should that XB code be there?

11 A. Did you say March and then May?

12 Q. Yeah, 30 days later.

13 A. That's 60 days later.

14 Q. I'm sorry, April. I'm sorry.

15 A. And I'm not trying to be a pain in the butt, but these
16 are very -- these are time sensitive obligations which is
17 why I'm trying to get these dates correct. I'm not trying
18 to be a pain.

19 Thirty days is the amount of time that the entire
20 investigation process can take place. And, so, what would
21 happen after 30 days -- the answer to your question is, no,
22 it wouldn't take 30 days for the XB to be added because the
23 entire investigation has to be completed in 30 days.

24 The XB code would be added prior to 30 days because it
25 has to be displayed on the tradeline that the furnisher,

1 Ocwen in this case, actually sends to the credit bureau
2 while they're actively investigating it. So 30 days would
3 be the end of it, not the, the beginning of it.

4 Q. But the XB code should start to appear shortly after
5 the consumer directly disputes with Ocwen; correct?

6 A. Yes. The obligation is for Ocwen or the furnisher to
7 place the XB code on the item that they -- and this is
8 important -- on the item that they have furnished to the
9 bureau because that is what they believe is in dispute.

10 That's the only thing that they can add the XB code to.
11 They don't have the ability to add XB codes to extraneous
12 information on a credit report. It's only the item that
13 they, in fact, reported.

14 Q. So by April, 2013, the XB code should be there.

15 A. Give me the dates again, please, the date range.

16 Q. From March to April. It's reported in March. It's
17 disputed in March. By April it ought to have the XB code.

18 A. If it's disputed in March, if we're talking 30 days
19 later in April, the dispute code should have been added and
20 likely removed by that point because the investigation would
21 have been over. You don't need -- you don't generally leave
22 the XB code on an item once the investigation is over.

23 Q. Ocwen didn't put an XB code on Mr. Daugherty's credit
24 line after receiving that March dispute, did they?

25 A. I would need to see the credit reporting screen logs

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1 that we were looking at yesterday that actually showed -- I
2 don't remember the dates of all of those entries, but some
3 of them did have XB. So I can't answer for sure without
4 seeing the materials.

5 Q. And that's the thing we call timeline or the time
6 tape -- excuse me -- the tape, the data tape, that exhibit?

7 A. I don't remember what the number of the exhibit was.

8 Q. Defendant's 2.

9 MR. YOUNG: May I see Defendant's 2?

10 BY MR. YOUNG:

11 Q. This is Defendant's 2. It says "Credit Reporting
12 Histories." And --

13 A. Thank you.

14 Q. You can confirm, sir, but I think you'll find that
15 there was never an XB code put on this account until
16 October. The dispute was in March but it wasn't put on
17 until October.

18 A. What am I looking at here?

19 Q. Well, --

20 MR. MANNING: Objection. I'm not sure what the
21 question is. What is he asking the witness to do?

22 MR. YOUNG: The witness wanted to see this exhibit
23 showing the monthly reporting by Ocwen to the credit bureaus
24 and I just handed it to him and he's looking at it now. And
25 I want him to tell me when Ocwen first put the XB code on my

1 client's account.

2 THE WITNESS: Is that the question?

3 BY MR. YOUNG:

4 Q. Yes.

5 A. Okay. All right. It looks like -- in this stack of
6 papers that I have here it looks like there is an XB code
7 added. It's Bates 625. Record created 11-18, 2013,
8 reporting period 10-31, 2013.

9 Q. So I misspoke. It was November, not October.

10 A. Pardon me?

11 Q. Well, I misspoke earlier then. It was November of 2013
12 when the XB code first appears on this account; correct?

13 A. I don't know what "record created date" is meant to
14 represent. It's probably a question better for the Ocwen,
15 the young lady from Ocwen. But I'm just giving you the
16 dates on the top of this document.

17 Q. Somewhere October, November the XB code gets put on the
18 account; correct?

19 A. Those are the dates associated with this screen capture
20 and the XB code is part of this particular screen capture.

21 Q. Thank you.

22 A. You're welcome.

23 Q. Now, putting an XB code on an account that's directly
24 disputed by a consumer to Ocwen, that's not something Ocwen
25 does as a courtesy or favor. It is -- in fact, the law

1 requires that. Correct?

2 A. It is, it is in the Fair Credit Reporting Act, yes.
3 They have to show the item as being in dispute if it, in
4 fact, is in dispute and if they don't deem that dispute to
5 be frivolous.

6 Q. And the law required Ocwen to place the XB dispute code
7 in March as soon as they received the March 14, 2013,
8 dispute letter. That's when it was required to be done.
9 Correct?

10 A. Right. They would have been required to place the
11 code, again, on the account that they had reported soon
12 after receiving the direct dispute.

13 Q. And you looked at a record which suggests that they
14 didn't do it until October or November of 2013; correct?

15 A. Well, I looked at a record that showed that it was done
16 and the dates were October, November. I don't know if that
17 was until -- I'm just -- that's just me reading my
18 understanding of that page of the document. I don't know if
19 it's sequential to a dispute or whatnot. I'm just telling
20 you those are the dates on that document.

21 Q. Well, assume that the documents don't show an XB code
22 until that date range you mentioned, October, November.
23 Ocwen violated the Fair Credit Reporting Act if they did not
24 mark this account with the XB code after receiving, after
25 receiving that letter on March 14th, 2014, disputing this

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1 foreclosure. Isn't that true?

2 MR. MANNING: Objection, calls for a legal
3 conclusion.

4 THE COURT: Overruled, counsel. I'm sorry. I
5 didn't hear the latter part, Mr. Manning.

6 MR. MANNING: I said it's a legal conclusion and I
7 believe it's outside the scope of what the Court's already
8 ruled on the FCRA.

9 THE COURT: All right. I heard the issue -- I
10 heard that part which indicated legal conclusion.

11 Any response to the entirety of the objection, counsel?

12 MR. YOUNG: Your Honor, this witness has been held
13 out by the defense as an expert on FCRA, a certified FCRA
14 expert. He's offered testimony almost 100 times on these
15 issues. I believe he is competent to conclude that Ocwen
16 violated the law when they did not put the XB code on as
17 required.

18 THE COURT: Are you done?

19 Mr. Manning, I overrule the objection. I do so given
20 the expertise of this witness. I also find that the
21 question generally is not outside of the scope of what was
22 asked on direct examination.

23 As I indicated to you all yesterday, there are times
24 when what we in the legal community would refer to as legal
25 conclusions intersect with expert opinions depending on who

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1 the expert is. And, so, here I find it to be within the
2 province of the expert given his expertise, preserving
3 Ocwen's objection and exception to my ruling.

4 Go ahead, please.

5 BY MR. YOUNG:

6 Q. In fact, sir, in your written opinion, your opinion
7 number three, you contradict the plaintiff's expert. And
8 you state, "The plaintiff's expert has suggested in his
9 report that Ocwen failed to list their accounts as being in
10 dispute. This is simply incorrect. And there are a variety
11 of documents produced to confirm that Ocwen did, in fact,
12 report the account on multiple occasions as being in
13 dispute."

14 That was your written opinion; correct?

15 A. Yes.

16 Q. What you left out of your written opinion was they
17 didn't do it back in March when they were supposed to. They
18 violated the law and didn't do it until October or November.

19 A. Well, --

20 Q. That was not in your opinion, was it?

21 A. Okay. So you keep pointing to this up here. And, so,
22 --

23 Q. This, this is the time line --

24 A. Let me finish my answer.

25 Q. Okay.

1 A. You are pointing to a tradeline that Ocwen did not
2 report to Equifax. I think everybody has -- we've covered
3 that. You continue to point to this false reporting of the
4 foreclosure with the \$6,100 past due. And I keep answering
5 you. You can't show something in dispute if you didn't put
6 it on the credit report. You can only show something in
7 dispute that you did put on the credit report.

8 Q. Here's what I'm pointing to.

9 A. Okay. You keep on pointing. It's kind of hard --

10 Q. Okay. Well, this is the letter. It's in evidence.
11 This is the letter that my client sent to -- and I can give
12 you the original so you don't have to --

13 A. I'm good.

14 Q. This is the one he sent that was received March 14th
15 where he's disputing directly with Ocwen that, "I am
16 currently behind \$6,000 and in foreclosure." This is what I
17 am pointing to. This is just for me because, you know, I
18 can't even keep the months straight.

19 A. Uh-huh.

20 Q. This is how I keep track of this. This is what I'm
21 referring to. And this, sir, is when the XB code upon
22 receipt of this dispute by Ocwen should have been placed on
23 his account. Correct?

24 A. That's impossible. And I'm glad you clarified that. A
25 furnisher cannot show something as being in dispute unless

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1 they reported it to the credit bureaus in the first place.
2 The only thing that Ocwen could have shown as being in
3 dispute is the non-duplicative account that no one has an
4 issue with in this case.

5 Q. So that's not in your report, is it?

6 A. No. It's in response to your question.

7 Q. Okay. And, so, now you're saying that, no, Ocwen --
8 when they got the letter from Mr. Daugherty -- you're now
9 telling this jury that they should not have put the XB code
10 on the account.

11 A. That's not what I said. I said they could not put it
12 on that account because they had no control over that
13 account. They didn't report it in the first place. There's
14 nothing in their system in those credit reporting screen
15 captures that you just showed me a few moments ago that show
16 the duplicative nature of Mr. Daugherty's account.

17 So adding an XB code to that particular account isn't
18 something that was systemically possible. Only the credit
19 bureau could have done that.

20 Q. But they added it in November and you say they can't do
21 that. Nothing has changed. You say they can't do it and
22 here it is added in November.

23 A. Yeah. I need to see the screen capture again of the
24 credit reporting timeline if you've got that.

25 MR. YOUNG: I walked off with the exhibit.

1 BY MR. YOUNG:

2 Q. Here it is back again, sir, Defendant's Exhibit 2.

3 A. Thank you. So Mr. -- I'm sorry. Is it Young?

4 Q. Yes.

5 A. Mr. Young, this page represents the non-duplicative
6 Ocwen account. This is the one that's in good standing,
7 status code 11. That means current account paid as agreed,
8 not five times -- or 120 days late, whatever all the
9 negative aspects of, of the account that was duplicative.

10 Q. Ocwen put it there in November, 2013; correct?

11 A. They put it on the good account, that's right. That's
12 the one they had control over, the right account, not the
13 duplicative account.

14 Q. Mr. Daugherty wasn't disputing the fact that he was
15 current. He was disputing the fact that it was -- the other
16 one was showing him in foreclosure. So now you're telling
17 me that in November they put the XB code on his good
18 account. Right?

19 A. Yes, sir, that's correct.

20 Q. And the effect of the XB code on the good account is
21 that when someone is scoring him, they can't even consider
22 the good account; correct?

23 A. That is incorrect.

24 Q. What is the effect of an XB code marked on his good
25 account when it comes to looking at his creditworthiness?

1 A. If the account is in good standing, the only thing that
2 would be excluded from the scoring process would be the
3 balance. So any credit score that would have been
4 calculated while Mr. Daugherty's correct Ocwen tradeline was
5 XB coded would have been he would not have been penalized
6 for the debt owed on that account.

7 Q. Under the Fair Credit Reporting Act, this XB code is
8 the notice of dispute code to use the technical language;
9 right?

10 A. I don't think the FCRA refers to XB anywhere. It just
11 requires that an item be shown as in dispute. And that's --
12 the XB code is how the industry complies with that
13 requirement.

14 Q. Okay. So if the completeness or the accuracy of any
15 information furnished by any person to any consumer
16 reporting agency is disputed to such person by a consumer,
17 the person may not furnish the information to any consumer
18 reporting agency without notice that such information is
19 disputed by the consumer. That is the law, isn't it?

20 A. You named it, furnished to the credit bureau. Ocwen
21 never, ever furnished this duplicative tradeline to any
22 credit bureau.

23 Q. If the completeness or accuracy of any information --

24 A. Keep going.

25 Q. -- furnished by any person to any consumer reporting

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1 agency is disputed, the furnisher, Ocwen, can't furnish it
2 anymore without putting the XB code on it; right?

3 A. You -- that's exactly right. If Ocwen would have
4 furnished this duplicative account with all this big
5 foreclosure black mark stuff on it and Mr. Daugherty
6 contacted them and said, "You are furnishing an account to
7 Equifax that has a foreclosure and \$6,000 past due and a
8 bunch of late payments associated with it that are wrong, as
9 the furnisher I want you to show it, you know, fix it."

10 Then as the furnisher, which they are not, Ocwen would
11 have been required to show it as XB coded because it would
12 have been in dispute. But they are, they are not the
13 furnisher of that account.

14 Your expert and I both agree that Equifax is the cause
15 of that duplicative account, not it being furnished by any
16 servicer or any lender.

17 Q. So it didn't have to be put on the code back in March
18 of 2013; correct? That's your testimony?

19 A. That's not what my testimony is. You keep saying "have
20 to." I've never said that. I keep saying it was
21 systemically impossible because they didn't control that
22 account because they're not the furnisher of that account.

23 Q. But somehow magically they could put the XB code on in
24 November. What's changed between March and November?

25 A. So they put the XB code on the one that they actually

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1 furnished, which is the non-duplicative account, the one
2 that Mr. Daugherty did not have a problem with.

3 Q. Why didn't they put that XB code on way back in March?

4 A. On -- Mr. Daugherty -- well, there was no foreclosure
5 associated with -- I don't believe, anyway -- the good
6 account or the non-duplicative account back in March.
7 Therefore, what he's challenging regarding that account
8 doesn't contain a big false foreclosure black mark on it.

9 I believe that was fixed -- or not fixed, modified
10 after Mr. Daugherty caught the payments back up. And I
11 don't have the dates right, but I believe that happened
12 sometime in the prior year.

13 Q. Will you agree that in March of 2013 that Equifax asked
14 Ocwen to confirm whether or not Mr. Daugherty's account was
15 current?

16 A. Say -- okay. So now we're talking about an indirect
17 dispute. So you're asking me if Equifax sent an ACDV to
18 Ocwen in March of 2013?

19 Q. Yes.

20 A. Okay. So I remember looking at almost two dozen ACDVs,
21 most of them sent throughout 2013 and 2014. So I don't know
22 if there was one for March, but that is plausible. That
23 makes sense because there were so many that were sent in
24 2013.

25 Q. There were actually 24 sent from 2013 to 2014 and they

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1 were sent in groups of two. You remember that from
2 reviewing them; correct?

3 A. Yes, I do.

4 Q. And each group of two ACDVs that came from Equifax to
5 Ocwen, each group of two had one ACDV where Equifax said,
6 "Please confirm that this gentleman is current." You saw
7 that ACDV, didn't you?

8 A. You're paraphrasing the dispute code. But -- so I
9 don't believe it said exactly what you just said. You're
10 paraphrasing it. They asked for a variety of fields to be
11 investigated. And if you'd like to hand me one of -- if you
12 want to look at ACDVs again, I'm happy to read the text of
13 the 106 code if you'd like me to.

14 Q. Everybody's seen these ACDV codes, forms over and over
15 and over again. You've seen them and you have them. Isn't
16 that true?

17 A. Many times, yes, sir.

18 Q. And not only was there one sent in March which said
19 confirm that he's current, there was another one that said
20 confirm he's in foreclosure, \$6,000 in default, and five or
21 more months past due. Those two documents came in Ocwen's
22 hands in March of 2013. Correct?

23 A. I don't recall ever seeing an ACDV that said what you
24 just suggested. Almost every ACDV that I saw disputed
25 liability, meaning not his or hers, the 001 code; and then

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1 three specific fields on a credit report, account status,
2 payment history, and I can't remember what the last one is.

3 But I don't recall any ACDV, any of the two dozen that
4 you're referring to ever saying anything about, "Please
5 confirm whether or not this account is in foreclosure or
6 past due." That's actually not even a dispute code. That
7 would have to go into the FCRA relevant box that's below the
8 dispute codes where someone can actually kind of key type in
9 the dispute.

10 Q. So are you telling the jury that Ocwen didn't verify on
11 12 occasions both that my client was current and that he was
12 in foreclosure? That's your testimony; is that right?

13 A. My testimony is that Ocwen was never asked to verify if
14 your client was in foreclosure. They were asked if the
15 account even belonged to your client, and then to verify the
16 three fields that were identified in the 106 or the 007
17 dispute code.

18 Q. There is no such thing as a paper ACDV. It's really
19 just data that goes back and forth through this e-OSCAR
20 system. Is that fair?

21 A. Well, the A stands for automated. So the CDV which
22 pre-dates the ACDV was a paper form of the same form.
23 Actually, if you kind of can think of a tablet of paper that
24 you rip the top one off to get to the next one, that's how
25 CDVs used to exist. But, no, in today's environment that

1 form is sent in an automated environment which is why it's
2 called the ACDV.

3 Q. So as far as this trial is concerned, Equifax sends
4 computer data electronically over to Ocwen. And Ocwen can
5 either confirm the information reported, modify it, delete
6 it, or delete it as fraud. Those are the four options when
7 Ocwen gets this information from Equifax. Correct?

8 A. That's right. They can, they can verify what is in
9 dispute. They can delete the tradeline. They can -- if the
10 tradeline is caused because of fraud, that's a different
11 type of deletion. But, yes, it essentially results in the
12 item being gone. Or they can modify the account
13 accordingly.

14 Q. So if I wanted to see how this ACDV process worked back
15 in March, I could go to Equifax and say, "Hey, let me see
16 your data." And then they could print it out on a piece of
17 paper for me, couldn't they?

18 A. I believe so, yes. They can recreate the e-OSCAR,
19 which is that phone line we talked about, the e-OSCAR log.

20 Q. And when they re-create it, it shows not only what they
21 sent over to Ocwen. It shows what Ocwen sent back.

22 A. That's correct, yeah, the response.

23 Q. So if I go to Equifax and say, "Give me this," they're
24 going to print out a piece of paper that shows this data on
25 their template. And if I go over to Ocwen and say, "Hey,

1 give me that ACDV that shows the information that was
2 transmitted to you and sent back to Equifax," if they
3 printed it out, it would be on a different template. They
4 wouldn't, they wouldn't be exactly the same.

5 A. It would cosmetically look different, that's correct.

6 Q. Yeah. They're mirror images of each other, aren't
7 they.

8 A. I'm not, I'm not -- mirror image means it would be
9 backwards. It's the same information. It's just
10 cosmetically laid out differently. I think we're saying the
11 same thing.

12 Q. I'm not exactly Bill Nye, The Science Guy. You're
13 right. A mirror would be reversal. But the control
14 number -- there is a 16-digit control number that every ACDV
15 gets attached to; right?

16 A. Yeah. That's how you correlate. That's right.

17 Q. So whether we look at Ocwen's or Equifax's form,
18 they're both going to have the 16-digit number on them?

19 A. If they're correlated, then they would be the same
20 control number, that's right.

21 Q. Same account number, same name, same data; correct?

22 A. That's right.

23 Q. Of course, we couldn't -- a furnisher -- how long do
24 they keep these? If I want to ask a furnisher say, "Hey,
25 what did you guys do in July of 2013," and I go to Equifax

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1 and they say, "Well, here's what we did, we can print it
2 out," if I go to Ocwen they should have the parallel
3 document, shouldn't they?

4 A. I, I don't know. I don't know what any furnisher's
5 policy is regarding document retention.

6 Q. Is there any reason why Equifax could produce it and
7 Ocwen couldn't?

8 A. Well, I mean, I guess the most obvious answer would be
9 that if Ocwen can't produce it but Equifax could, maybe
10 Equifax has a longer retention policy or maybe even systemic
11 ability to retain documents longer. I don't know why they
12 would -- those are just kind of speculation as to why one
13 party would be able to and the other wouldn't.

14 Q. Well, what if one of these ACDVs -- what if the
15 information on one of these ACDVs that, received by Ocwen
16 from Equifax and then responded back to Equifax, what if one
17 of those really, really could hurt Ocwen? It wouldn't want
18 to keep that stuff around, would it?

19 A. I don't -- what do you mean "hurt"?

20 MR. MANNING: Objection, calls for speculation.
21 He's just said they're mirror images. I don't know where
22 he's going with this.

23 MR. YOUNG: I withdraw the question, Your Honor.

24 THE COURT: All right. The question has been
25 withdrawn, Mr. Manning.

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1 And you need to find a convenient stopping place,
2 Mr. Young.

3 MR. YOUNG: This is it, Your Honor.

4 THE COURT: All right.

5 Ladies and gentlemen, I'll give you your luncheon
6 recess. While you're out, do not discuss this case among
7 yourselves or permit anyone to discuss it with you or in
8 your presence. And please be in your jury lounge at 1:15.
9 We'll stand in recess.

10 (Recess taken from 12:00 p.m. until 1:20 p.m.)

11 THE COURT: Good afternoon, everyone.

12 Mr. Young.

13 MR. YOUNG: Thank you.

14 BY MR. YOUNG:

15 Q. Mr. Ulzheimer, when I started my examination, or
16 cross-examination we talked about the big false foreclosure
17 black mark that I hypothetically have on my credit even
18 though I'm absolutely current on my mortgage. And I think
19 you agreed with me that it wouldn't be unreasonable for me
20 to be angry and upset when I discovered that. Correct?

21 A. That's correct, yes.

22 Q. And you also said it wouldn't be unreasonable for me to
23 believe that if I wrote a letter to my mortgage company that
24 it ought to be fixed; correct?

25 A. I'm not sure I used those exact words, but I don't

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1 disagree with your paraphrasing.

2 Q. Okay. And I think you also said you probably ought to
3 send a letter to the credit reporter too; right?

4 A. That's -- if you asked me what I would have done, I
5 said I would have burnt the candle at both ends by sending
6 it to the credit reporting agencies.

7 Q. So, I'm angry and I'm upset. This false foreclosure
8 black mark is on my credit. And I send a letter to my
9 mortgage company and I tell the credit reporting agency that
10 this is wrong. And I check my credit again and it's still
11 on there.

12 It's not unreasonable for me to be angry and upset that
13 even after I wrote my mortgage company and reported this to
14 the credit reporting agency that it's still on there, that's
15 not an unreasonable response, is it?

16 A. That you're angry and upset?

17 Q. Yes.

18 A. I -- again, I'm not clinically trained, but I, I don't
19 disagree with your hypothetical.

20 Q. I'm not talking medically. I'm talking every day.
21 People get angry and they get upset, don't they?

22 A. They do.

23 Q. And if I got angry and upset when I saw it on there and
24 it shouldn't have been there and then when I tried two
25 different ways to get it fixed, that anger is going to get

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1 greater and the upset is going to get greater, isn't it?

2 A. I, I, I don't know. I'll, I'll concede that you would
3 be angry. As far as the ascending degree of your anger, I,
4 I don't know.

5 Q. Well, I sent a letter to my creditor. I reported it to
6 the credit agency. I tried to fix it and I failed. Now,
7 let's say I try again and again and again and again and
8 again and again and again and again and again and I've tried
9 ten times and it's still there.

10 Would you agree that that is stress right there? Ten
11 times I tried and failed to get a false statement off my
12 credit. Would it be fair to say that I might be a little
13 bit stressed after ten times?

14 A. I, I don't know. I don't know if that would cause
15 stress or just continued anger. I don't know.

16 Q. If you tried ten times to fix your credit and it wasn't
17 fixed, you wouldn't feel a little bit stressed?

18 A. I've personally never gone through that situation, so
19 I, I can't tell you how I might feel if that were to occur.

20 Q. Well, what if I tried 15 times and it's still not
21 fixed? You won't concede that I might be justifiably a
22 little bit stressed?

23 A. If, if you're stressed because of that, then, okay. I
24 don't -- again, I don't, I don't have a barometer for how
25 many of those would cause stress versus anger. That's just

1 not my specialty. I'm sorry.

2 Q. Okay. Well, would I be unreasonable if I was stressed
3 out because 15 times I tried and failed to fix my credit?
4 Is that unreasonable?

5 A. That you've tried 15 times and failed to correct --

6 Q. Yeah. Not if that's unreasonable. Is it unreasonable
7 that I might be stressed out after failing 15 times to get
8 my credit fixed?

9 A. I, I wouldn't purport to call you unreasonable for
10 anything regarding your own personal feelings about
11 anything, including the credit report process.

12 Q. And when I get up to 20 times and it's still not fixed,
13 I still wouldn't be unreasonable to be stressed out over the
14 fact that I tried 20 times to get something untrue off of my
15 credit, would I?

16 A. Again, I wouldn't, I would never purport to call you
17 reasonable or unreasonable regarding how you feel about
18 these things. That's not my place to do that.

19 Q. Put four more on there. That's 24. You reviewed 24
20 ACDVs, didn't you?

21 A. Yes, sir, that's correct.

22 Q. And you saw where there were two phone calls by
23 Mr. Daugherty to Ocwen complaining about this. You saw
24 that, didn't you?

25 A. Yes, sir, I did.

1 Q. And you saw the two letters that Mr. Daugherty sent to
2 Ocwen complaining about this, didn't you?

3 A. I did, yes.

4 Q. And you saw the three times the Federal Consumer
5 Agency -- what's the name of that agency again?

6 A. I think you're referring to the CFPB, or the Consumer
7 Financial Protection Bureau.

8 Q. And if three times they intervened on my behalf in
9 addition to the 24 ACDVs, the two phone calls, and the two
10 letters, I'm up to 32 times I have tried and failed to get
11 this big false foreclosure black mark off my record. Am I,
12 am I -- hypothetically am I justifiably upset, distressed
13 about this?

14 A. Again, I wouldn't purport to call you reasonable or
15 unreasonable to be stressed about this scenario or any other
16 thing in your life that may cause you discomfort.

17 Q. Wouldn't you agree that after I failed to get this
18 untruth, this lie off of my credit, after I failed 32 times
19 that it may begin to affect my health, this stress?

20 MR. MANNING: Objection, calls for speculation.

21 THE COURT: Response to the speculation objection?

22 MR. YOUNG: It's well within the scope of this
23 expert's testimony. He testified as to damages. And I'm
24 exploring that with the actual facts of this case, Your
25 Honor.

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1 THE COURT: Anything further, Mr. Manning?

2 MR. MANNING: Yes, Your Honor. He's also said a
3 number of times, "I'm not a doctor." And Mr. Young just
4 asked him about his health. He's not a doctor.

5 THE COURT: I'm going to sustain the objection,
6 Mr. Young, to the last question.

7 MR. YOUNG: Okay.

8 BY MR. YOUNG:

9 Q. I'm not going to ask you about health in the medical
10 sense, sir. I'm going to ask you about stress that we all
11 encounter on a day-to-day basis. And you understand that
12 kind of stress. You've experienced it yourself, haven't
13 you?

14 A. Sure. Some things cause me stress.

15 Q. And it would be -- would it be unreasonable for me to
16 be stressed when I failed 31 times to get the truth out,
17 that even after 31 tries there is still this black big false
18 foreclosure black mark on my credit? That is the definition
19 of "stress," sir, isn't it?

20 A. I'm not familiar with what the actual definition of
21 "stress" is. Not to be curt, but I'm pretty sure it doesn't
22 have anything to do with big false foreclosure black marks.
23 But, again, I wouldn't purport to suggest that you wouldn't
24 be stressed from anything in your life. I'm just not
25 qualified to identify things that are stressful -- I'm

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1 qualified to identify things that are stressful to me, not
2 to you or any other individual. I'm sorry.

3 Q. Well, assume further that after 31 attempts to get the
4 truth out and to get this lie off of my credit -- let me ask
5 it this way. Should I have to file a lawsuit in the United
6 States District Court for the Southern District of West
7 Virginia to get this false report off of my credit?

8 MR. MANNING: Objection, argumentative.

9 THE COURT: The objection to it being
10 argumentative as well as the substance of it is sustained,
11 Mr. Young, for this witness.

12 BY MR. YOUNG:

13 Q. Sir, after I file my lawsuit because my credit still
14 shows a lie and one more time I ask Ocwen to fix it and they
15 verify that I'm still in foreclosure, do you see anything
16 wrong with that?

17 A. I can identify a lot of things that went wrong that
18 pre-date the filing of the lawsuit. I'm not sure I --
19 again, if the item was not furnished by Ocwen and Ocwen
20 wasn't aware that it was being disputed, then I'm still of
21 the same opinion that they wouldn't know to investigate the
22 issue of duplicative tradelines.

23 Q. This lawsuit was filed July 8th, 2014. And you
24 reviewed the two ACDV responses from Ocwen back to Equifax
25 dated August 7, 2014, didn't you?

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1 A. Yes, sir.

2 Q. So I'm in the United States District Court. I've had
3 all of these attempts to fix my credit and it's not fixed.
4 And when I come into court Ocwen says it's all my fault. Is
5 that fair to blame all this on me that it's my fault that I
6 couldn't get this lie off of my credit? Is it my fault?

7 MR. MANNING: Objection, argumentative.

8 THE COURT: Objection is sustained.

9 BY MR. YOUNG:

10 Q. You did testify that Mr. Daugherty should have done
11 more, didn't you?

12 A. I don't think I said that. I'm pretty sure we all
13 identified Equifax as the root cause, not Mr. Daugherty.

14 Q. So it's not your opinion in this case that
15 Mr. Daugherty is at fault for the fact that this lie
16 remained on his credit even after this lawsuit was filed.
17 Is that, is that your opinion?

18 A. I'm hesitant to answer the question because I think my
19 answer is going to dovetail into a topic that Her Honor may
20 not want me to discuss.

21 Q. Okay. I'll withdraw the question.

22 A. Okay.

23 Q. I don't want to put you in any dilemma.

24 A. Yeah.

25 Q. Thank you very much, sir.

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1 A. Thank you, sir.

2 THE COURT: Redirect of this witness, Mr. Manning?

3 MR. MANNING: Yes, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. MANNING:

6 Q. Let's start with this, Mr. Ulzheimer. Is there
7 anything special about foreclosure on a credit report as
8 opposed to any other negative derogatory marks?

9 A. No. There are a variety of major derogatory entries on
10 a credit report. Foreclosure's on par with many other
11 entries that are considered made or derogatory entries.
12 There's nothing super about a foreclosure relative to a
13 bankruptcy or a tax lien or a charge-off or a repo or a
14 collection.

15 Q. Its size, shape, and color is not relevant?

16 A. I'm sorry?

17 Q. Its size and shape and color is not different or
18 relevant in any way?

19 A. That just seems theatrical. It's not -- none of
20 that -- none of those words are on a credit report except
21 for the word "foreclosure."

22 Q. Let's get back to the facts. Mr. Young was asking you
23 a variety of hypotheticals.

24 A. Okay.

25 Q. A couple of times you had said, "You're missing facts.

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1 You're missing assumptions." So I'm going to provide you
2 with a couple of hypotheticals --

3 A. Okay.

4 Q. -- with some additional facts.

5 Hypothetically if in May, 2014, there was a mortgage
6 lender who denies Mr. Daugherty a mortgage loan after a
7 credit application is processed -- are you with me so far?

8 A. Yes.

9 Q. -- but that mortgage lender never looks at the Equifax
10 report --

11 A. Okay.

12 Q. -- so never sees the foreclosure duplicative account
13 that Equifax is reporting --

14 A. Nothing on the Equifax report at all; right?

15 Q. Right.

16 A. Are we on the same page?

17 Q. Yes.

18 A. Okay.

19 Q. What does that tell you about the cause of the denial
20 of that mortgage loan?

21 A. Using your hypothetical, because the Equifax report was
22 not a component considered by the mortgage lender any reason
23 for denial, and there could be a variety of reasons for
24 denial of a mortgage loan, but none of them would have been
25 because of anything on an Equifax credit report because they

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1 never got it to consider it.

2 Q. Okay. Let me give you another one. Let's say in July,
3 2014, Mr. Daugherty approaches a mortgage lender and that
4 mortgage lender stops the application process because
5 Mr. Daugherty tells them there's a foreclosure. Are you
6 with me so far?

7 A. Pre-underwriting or post-underwriting?

8 Q. Good question. Okay. So define "underwriting."

9 A. Appraisals are ordered. You know, when you apply for a
10 mortgage loan, you're usually filling out a stack of
11 paperwork about aye thick. And it's sent off to another
12 group of people whose role it is to actually assess the risk
13 of doing business with the applicant considering credit,
14 income, the loan-to-value of the home. That's generally
15 referred to as underwriting.

16 Q. Okay. So thank you. The hypothetical I want to give
17 you then is pre-underwriting.

18 A. Okay.

19 Q. So the facts of the hypothetical are there's a mortgage
20 lender in July, 2014, who stops the application process
21 because of that particular bank or representative's policy
22 not to proceed if there is a foreclosure.

23 A. Okay.

24 Q. But none of that stuff you just described was done.

25 A. Okay.

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1 Q. No appraisals, no loan-to-value.

2 A. Pre-underwriting.

3 Q. Yes.

4 A. Okay.

5 Q. Does that constitute denial of credit based on the
6 foreclosure?

7 A. No. A denial of credit would result -- well, a denial
8 of credit is a denial of credit. And I realize that's kind
9 of a silly way of putting it. But when a denial of credit
10 occurs, it sets into motion an additional series of events
11 which would include the declination letter, the adverse
12 action letter notifying the consumer of his rights, et
13 cetera, et cetera -- we looked at a couple of those letters
14 before lunch -- just telling somebody, you know, "We can't
15 go any further, we're not even going to go to underwriting,"
16 that's not a denial.

17 And the reason that's meaningful and relevant is
18 because you can be denied a mortgage loan for something
19 other than a credit report. If, if I have a fantastic
20 credit report, yet I am trying to borrow too much money
21 relative to my income, I'm going to be denied.

22 I can have a fantastic credit report and a huge income.
23 However, if I'm trying to borrow \$100,000 for a house that
24 appraises for \$50,000, I'm going to be denied because what
25 is referred to as the LTV, or loan-to-value, is out of

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1 whack.

2 So you can't just -- that's why you have to let
3 underwriting completely proceed so that all of these other
4 non-credit related metrics can, or measurements can occur
5 before you truly approve or deny a mortgage application.

6 Q. So in light of that, what does the fact that there was
7 no actual denial of credit, no adverse action letter that
8 actually occurred, what does that tell you about whether the
9 foreclosure was a factor?

10 A. It couldn't have been a factor because underwriting
11 didn't proceed. It's kind of casually telling someone,
12 "Hey, you shouldn't apply for credit because I don't think
13 you're going to be approved."

14 Q. I'd like to move on to the hypotheticals about stress.

15 A. Okay.

16 Q. So here's a hypothetical about stress. Let's say you
17 want to get your car fixed.

18 A. Okay.

19 Q. And you bring it into the mechanic and you drop it off
20 and say, "Fix my car."

21 A. Okay.

22 Q. And the mechanic returns it. The oil is changed. And
23 you get in there and like, "He didn't fix my car." Are you
24 justified in feeling stressed by that?

25 A. In your example, and I don't know if you meant to --

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1 you didn't really tell me what's wrong with the car. You
2 just kind of vaguely said, "Hey, fix my car." And I'm not a
3 mechanic, but I'm pretty sure cars have a lot of -- I've
4 paid for enough repairs to know that cars have a lot of
5 things that can go wrong with them.

6 So I don't think you can -- you can't just assume that
7 just because you say, "Hey, fix my car," and you get it back
8 and whatever you in your mind thought was wrong or if it
9 wasn't addressed because you didn't, you didn't focus the
10 mechanic on, I don't know, the, the noise in the rear-end
11 housing -- I don't know. You see where I'm headed.

12 Q. Right. Whatever it is that you were concerned about
13 wasn't identified to the mechanic.

14 A. I didn't tell you what to fix or what I -- I didn't
15 tell you anything to diagnose what I think is wrong with my
16 car.

17 Q. Okay. What if you do that ten times? Are you anymore
18 justified in feeling stressed?

19 A. Again, I'm not a stress expert, but I wouldn't -- you
20 know, what's the saying? Fool me once, shame on you; fool
21 me twice, shame on me. If I recognize that I'm not
22 providing enough information to this mechanic over and over
23 and over again, I think eventually I would, I would tell him
24 or her, you know, "Stop trying to fix my radio. It's really
25 the sound in the engine that I'd like you to focus on."

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1 Q. Okay. I'm going to give you another hypothetical.

2 A. Okay.

3 Q. That one was just you and the mechanic. Now you've got
4 a friend and your friend is good with cars.

5 A. Okay.

6 Q. Okay? And you ask your friend, "Hey, can you help fix
7 my car?" And your friend takes your car and drops it off at
8 the mechanic. He doesn't tell the mechanic anything except,
9 "Please fix the car." So it's you giving it to a third
10 party who drops it off at the mechanic. But the message is
11 the same, "Fix the car." And it comes back with an oil
12 change. Are you justified in feeling stressed?

13 A. I kind of don't think I needed my friend in that
14 scenario, though, because I could have dropped it off at the
15 mechanic shop myself. So it seems like I'm not optimizing
16 the process. And that seems like something that I think I
17 would do.

18 I wouldn't ask someone to fix my car and then have he
19 or she just drop it off at the dealership. I could have
20 done that. And, certainly, I would say -- look, this is me
21 personally. If something was wrong with my car, I would
22 take it upon myself to take it to a fix-it shop and tell
23 whoever the person was who was in front of me, "Look, Mr.
24 Smith, I'm pretty sure I've got something wrong with my
25 engine because it's making this funny noise. Can you

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1 please --" you know, "I'll either recreate it for you and
2 you can look at it and I'll show it to you. Here it is.
3 Can you please address that issue? Thank you very much."

4 Q. But what if, what if you didn't know what the problem
5 was and you were hoping your friend would help you?

6 A. Okay.

7 Q. In that hypothetical -- and your friend doesn't give
8 any additional information to the mechanic than you -- is
9 that justified in the fact that it still wasn't resolved?

10 A. I think I'd be more angry with my friend because if he
11 or she portrayed himself as, I think you said knowing a lot
12 about cars, I think dropping it off at a dealership really
13 isn't indicative of knowing a lot about cars.

14 So I think I would be actually more angry with my
15 friend rather than the mechanic. We're still not giving the
16 mechanic the relevant information which is clearly
17 identifying what in the world I believe is wrong with my
18 car.

19 Q. So in all those -- I can't remember the number that
20 Mr. Young provided. We know approximately 24 ACDVs, two
21 telephone calls, two letters.

22 A. I think we were at 31 on his chart.

23 Q. Okay. In any of those, was the actual problem
24 identified?

25 A. No. I never saw any, anything that led me to believe

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2 that someone actually said, "We have a duplicative
3 tradeline. Obviously, I don't have two loans with, with
4 this company. That's erroneous. Address it." I didn't see
5 anything that said that.

6 Q. As a result, is there any basis for plaintiff to be
7 seeking Ocwen's responsibility for causing him damages?

8 A. I don't believe so.

9 Q. Thank you.

10 THE COURT: Sir, you can --

11 MR. MANNING: No further questions.

12 THE COURT: Sir, you can step down.

13 THE WITNESS: Thank you, ma'am.

14 THE COURT: Call your next witness.

15 MR. MANNING: Your Honor, the defense rests.

16 THE COURT: Any rebuttal evidence, counsel?

17 MR. YOUNG: No rebuttal, Your Honor.

18 THE COURT: All right.

19 Ladies and gentlemen of the jury, I'm going to excuse
20 you to your jury lounge. While you're out, do not discuss
21 this case or permit anyone to discuss it with you or in your
22 presence. And be in your jury lounge at a quarter after the
23 hour. We'll stand in recess for your purposes.

24 (Jury retired to the jury room at 1:45 p.m.)

25 THE COURT: All right, counsel, I will shortly
have the charge brought to you so that you can have a little

1 time here to review it before I charge the jury.

2 How much time do you want to argue this case?

3 MR. YOUNG: Plaintiff would like 30 minutes. We'd
4 like to use at least 20 of it to begin with and reserve 10.

5 THE COURT: All right. Is that sufficient, Mr.
6 Manning?

7 MR. MANNING: I haven't actually timed it, but I
8 think I can do it in 45.

9 THE COURT: Given the amount of evidence in this
10 case, that seems lengthy to me. Why don't I help a little
11 bit and give you both 35 minutes a side.

12 MR. MANNING: That's fair, Judge.

13 THE COURT: All right.

14 MR. YOUNG: I'd like to allot mine, Your Honor, 25
15 and 10.

16 THE COURT: And does that mean that you want to be
17 noticed when you are about to use 25? Because I don't
18 interrupt people unless you ask me to.

19 MR. YOUNG: I'll interrupt Mr. Nolan if he runs
20 over because he's running into my time after that.

21 THE COURT: All right. He would probably me
22 rather do it than you, but that's fine.

23 Counsel, I want to put on the record my Rule 50 ruling
24 based on your arguments here this morning.

25 I have reviewed your arguments relative to the

1 defendant's Rule 50 motion for judgment as a matter of law.

2 I find, counsel, in viewing this evidence in the light
3 most favorable to the plaintiff that the evidence is, in
4 fact, sufficient to go to the jury on the issues of whether
5 the defendant conducted a reasonable investigation on the
6 issue of willfulness as well as the issue of causation.

7 When the evidence, in my opinion, is viewed as
8 required, given the testimony of the plaintiff, the
9 testimony of Tina Daugherty, the witness Hendricks, Napier I
10 believe was the name, and even that, quite frankly, of
11 Sandra Lyew, as well as the documents that were admitted
12 into evidence, I find there is sufficient evidence for the
13 jury's consideration of non-economic damages, particularly
14 in light of the defendant's and his wife's testimony.

15 In other words, I find that the evidence is such that a
16 reasonable jury could find for the plaintiff on those
17 issues.

18 Now, I have not seen all of the documents that have
19 been admitted into evidence. I've listened carefully to
20 what I understood was being presented.

21 Based on my review, I agree with the defendant that the
22 plaintiff has not presented any evidence that quantifies
23 economic damages which would result in the jury having to
24 speculate about those damages. And, therefore, as it
25 relates to economic damages, the motion is granted.

1 In other words, there was no evidence, for instance, to
2 indicate if the defendant had been able to obtain a loan
3 what the difference economically would have been for him
4 then as opposed to obtaining it at some later date.

5 So since that's not been quantified for the jury, the
6 jury would be required to speculate. So I grant the motion
7 as it relates to that.

8 The defendant has also objected and specifically relied
9 on the *Safeco* case as it relates to the issue of
10 willfulness.

11 I find that the holding in that case is not applicable
12 to the facts in this case. I've reviewed the case law. And
13 specifically if we look to the *Safeco* opinion, as you all
14 will recall, the Court, the District Court reviewed motions
15 for summary judgment for both a case related to *Safeco* and
16 one related to *Geico*. Those cases were later consolidated
17 on appeal.

18 As I recall, the District Court granted summary
19 judgment in favor of both of those entities, and the Court
20 of Appeals reversed on one and I believe reversed and
21 remanded on the other.

22 And on appeal before the Supreme Court after they
23 granted cert. the Supreme Court with respect to the *Safeco*
24 *Insurance Company* found that there was some ambiguity given
25 how *Safeco* was determining its premium rates for first-time

1 insurance customers.

2 They found that there was some ambiguity inasmuch as
3 the rate was not the best rate depending on -- the rate was
4 awarded, I believe, based on your credit score. And in the
5 case of the two plaintiffs in this case, they did not
6 receive the best rate because of their credit score.

7 So there was a lot discussion in the case as to whether
8 or not that constituted an increase in the premium rate
9 which would be adverse action which would trigger the notice
10 provision.

11 The Court found that there was nothing in the statute
12 to indicate when you would count something as an increase.
13 They also found that there was no precedent by any appellate
14 court which would have guided *Safeco* in its determination as
15 to whether or not a notice was required under those
16 particular facts.

17 And that being the case, the Court indicated that there
18 was no -- that *Safeco's* reading of the statute was not
19 objectively unreasonable. It was somewhat amusing that they
20 also indicated in finding that it was not objectionably
21 unreasonable that it had been sufficient to convince the
22 appellate court that it was correct.

23 So looking at that case, in other words, looking at the
24 facts of this case, I find that it's not applicable. This
25 case is about reasonable investigation. No *Safeco* type

1 situation exists in this case. The statute isn't ambiguous.
2 And, plus, we all know that there's been precedent in case
3 law sufficient to guide a furnisher like Ocwen at least
4 since -- at least since 2004 if we look to the *Johnson* case.
5 So there's been precedent and there's no ambiguity in the
6 statute like the facts in *Safeco* presented for the Court's
7 consideration.

8 So, again, I find that there is sufficient evidence
9 here, should the jury decide to accept it, to support a
10 finding of willfulness. I preserve the defendant's
11 objection and exception to my findings with respect to
12 reasonable investigation, causation, and willfulness, as
13 well as non-economic damages going to the jury. I preserve
14 the plaintiff's objection relative to my finding as to
15 economic damages.

16 I'll have someone to bring in to you all the charge and
17 you can review it and then I'll take the bench here shortly.

18 MR. MANNING: Your Honor, --

19 THE COURT: Yes, sir.

20 MR. MANNING: -- now that we've completed our
21 case, we would renew our Rule 50 motion based on Mr.
22 Ulzheimer's testimony on the issues that we've already
23 discussed with Your Honor.

24 THE COURT: All right. Response, Mr. Nolan?

25 MR. YOUNG: I'm sorry, Your Honor?

1 THE COURT: I asked Mr. Nolan if he had a response
2 to the renewal of the Rule 50 motion now that Mr. Ulzheimer
3 has testified.

4 MR. NOLAN: Your Honor, I believe Mr. Ulzheimer's
5 testimony just further supports our claim that they do not
6 have reasonable investigation policies and procedures in
7 place because he's testified that they can restrict their
8 investigation to the dispute code contained in the CRA and
9 not look at all the relevant information on the ACDV and not
10 look at other relevant documents when they receive these
11 disputes. And based on his testimony, we should still be
12 allowed to proceed on that count.

13 And, further, he testified regarding the types of
14 non-economic damages the plaintiff is seeking in this
15 matter. We believe that nothing in his testimony has
16 affected the Court's ruling from before.

17 THE COURT: Giving consideration to the witness's
18 testimony, I reaffirm the rulings that I have placed on the
19 record, finding that those matters that I've indicated are
20 proper for the jury's consideration remain so.

21 You reminded me -- and I preserve the defendant's
22 objection and exception.

23 You reminded me as you stood, Mr. Nolan, that during
24 the course of your argument relative to the Rule 50 motion
25 you at least impliedly requested judgment as a matter of law

1 for the plaintiff on a couple of issues. And I deny that,
2 finding those issues are appropriate for the jury's
3 consideration, preserving an objection and exception for you
4 if it was your intent to argue it. I know it was at least
5 implied by the statements that you made in support of your
6 argument.

7 MR. NOLAN: Yes, Your Honor.

8 MR. YOUNG: Your Honor, I was trying to rise
9 before you left the bench to raise that. It's been
10 addressed and thank you.

11 THE COURT: All right. I'll return shortly,
12 counsel.

13 (Recess taken from 1:57 p.m. until 2:23 p.m.)

14 THE COURT: Counsel, I don't know if you've had an
15 opportunity to get through the charge or not, but you will
16 see that I've tried to keep the substantive portion as
17 simple for the jury as I possibly can.

18 Plaintiff, have you finished?

19 MR. NOLAN: Yes, Your Honor.

20 THE COURT: Mr. Nolan, objections to the charge?

21 MR. NOLAN: No, Your Honor.

22 THE COURT: All right.

23 Defendant, have you completed your review?

24 MR. MANNING: Not yet, Your Honor.

25 THE COURT: All right. How much longer do you

1 need, Mr. Manning?

2 MR. MANNING: I'm making good progress. I'm on
3 Page 16.

4 THE COURT: All right. Thank you.

5 (Pause)

6 THE COURT: Mr. Manning, I assume that you know
7 that there were no instructions filed on behalf of the
8 defense.

9 MR. MANNING: We, we did provide instructions,
10 Your Honor. We actually sent them straight to the clerk in
11 chambers. And this was way back. And we actually called
12 and confirmed that.

13 THE COURT: I don't know who you spoke with, but
14 this is my clerk and we received no instructions nor were
15 there any filed by the deadline set forth in the scheduling
16 order. I just wanted to make sure that you all knew that.

17 MR. MANNING: No, Your Honor. And I actually have
18 some e-mail confirmation of this. So I'd be happy to
19 provide that to you.

20 THE COURT: That's fine. And who is your e-mail
21 from?

22 MR. MANNING: I will find out.

23 THE COURT: All right.

24 Mr. Kenney, are you completing those?

25 MR. KENNEY: Yes, I will.

1 THE COURT: Thank you. That will let us proceed.

2 (Pause)

3 THE COURT: All right, Mr. Kenney, let's begin
4 with your objections, please.

5 MR. KENNEY: Your Honor, may I go out in the
6 hallway and grab Mr. Manning just because he wrote these
7 earlier notes so I'd like to get his insight on what he
8 meant --

9 THE COURT: And if you need to take over looking
10 for an e-mail or something, that's fine but I want to get on
11 with this.

12 MR. KENNEY: Yes, Your Honor. Thank you.

13 THE COURT: Yes, sir.

14 (Pause)

15 MR. MANNING: Karen Sword on October 26th.

16 THE COURT: Of last year?

17 MR. MANNING: Yes.

18 THE COURT: All right. I will check. But we have
19 been looking for them and not received them. But I will
20 check. Karen Sword is my Judicial Assistant, Mr. Manning.

21 MR. MANNING: And she did confirm that we were not
22 to file them. She said the order says send them to
23 chambers. Do not file them. And, so, that's why we did not
24 file them on ECF. We sent them to chambers pursuant --
25 because the order doesn't say that. It doesn't say file.

1 So we called to make sure.

2 THE COURT: All right.

3 MR. MANNING: Karen Sword confirmed, "Yes,
4 e-mail." And then she responded, "I have received them," on
5 that date.

6 THE COURT: Well, I apologize to you. There's
7 some mixup then because I have checked with her as well as
8 the law clerks as I was trying to prepare the charge and
9 unable to locate them.

10 MR. MANNING: Would you like me to forward that
11 e-mail to you right now?

12 THE COURT: No, it's not necessary. I accept your
13 word, Mr. Manning.

14 MR. MANNING: Okay.

15 THE COURT: Let's proceed with your objections.
16 The jury is waiting.

17 MR. MANNING: Well, Judge, the disadvantage I'm at
18 is obviously the Court hasn't considered our jury
19 instructions.

20 THE COURT: I have not. But you have considered
21 the charge and you can tell me what objections you have to
22 what's in it and what isn't. And if there's something that
23 I need to put in it, I'm certainly open to doing that. But
24 we need to get on with it. I'm ready. Let's begin, Mr.
25 Manning, with your objections.

1 MR. MANNING: Judge, very candidly, I haven't had
2 the opportunity to finish reviewing these, but I will make
3 the ones that I can.

4 THE COURT: I'm sorry. When you left you were on
5 Page 16. And I then asked Mr. Kenney if he was continuing
6 the review which I thought meant he would take up the
7 objections. And he wanted to come and get you.

8 So between the two of you, maybe he's completed from 16
9 through. I'll hear from either of you. But the jury's
10 waiting and I want to get on with the objections.

11 Go ahead, please.

12 MR. MANNING: On Page 15, Your Honor, it says,
13 "The Court instructs the jury that to determine whether
14 Ocwen conducted a reasonable investigation," right at the
15 bottom of the page --

16 THE COURT: Uh-huh.

17 MR. MANNING: -- insert there "of the dispute,"
18 comma.

19 THE COURT: Of the defendant's dispute?

20 MR. MANNING: Well, the plaintiff's dispute.

21 THE COURT: Plaintiff's dispute.

22 Any objection, counsel? I think that's clarity.

23 MR. NOLAN: No objection, Your Honor.

24 THE COURT: All right.

25 MR. MANNING: Moving forward from there, right

1 where you left off, Judge, "You must consider," and then
2 insert "the information Ocwen received from the credit
3 bureau," comma.

4 THE COURT: Okay. That is included in the
5 statutory language. This is a different concept of
6 considering each of the steps it took and what steps it
7 might have taken but did not.

8 The statutory language tells them "review all relevant
9 information provided by the consumer reporting agency." So
10 that's the issue that you're talking about.

11 MR. MANNING: Yes, Your Honor.

12 THE COURT: It's included on Page 13, Mr. Manning.

13 MR. MANNING: And, Your Honor, because it's not
14 included two pages later, I want to include just those five
15 words because in context is how people understand things.
16 And it says -- it's telling the jury what you must consider
17 for a reasonable investigation. And it says --

18 THE COURT: All right.

19 MR. MANNING: And it needs to say "the information
20 Ocwen received from the credit bureau," comma.

21 THE COURT: All right. I will give consideration
22 to that language.

23 Any objection, Mr. Nolan?

24 MR. NOLAN: No objection to Your Honor considering
25 it.

1 THE COURT: All right. Go ahead, Mr. Manning.

2 MR. MANNING: On the next page, Page 16 --

3 THE COURT: Uh-huh.

4 MR. MANNING: -- "under the law any information
5 Ocwen furnishes to a credit bureau." Do you see where I'm
6 reading?

7 THE COURT: Yes, sir.

8 MR. MANNING: Insert "about the dispute" and then
9 continue "must be complete and accurate" consistent with the
10 statute.

11 THE COURT: I don't think it's necessary but I
12 certainly have no objection to adding it. I think the jury
13 understands that this is all about the dispute raised by the
14 plaintiff.

15 Go ahead, sir.

16 MR. MANNING: At the bottom of that same
17 paragraph, it's the paragraph that ends "consumer's
18 dispute."

19 THE COURT: Uh-huh.

20 MR. MANNING: Instead of period make it a comma.
21 "Though it need not resolve --" what the first part of the
22 sentence is saying is it can't be casual, hasty, or
23 superficial. That's all plaintiff's language. I'd like to
24 add a second clause where it says "though it need not
25 resolve the dispute or discover the validity of the

1 dispute." It needs to be balanced because it's mutual.
2 Reasonableness is both sides.

3 THE COURT: I am going to deny adding that. This
4 language is directly from the case law. It isn't the
5 plaintiff's language. This is directly from case law in my
6 effort to try to get the jury to understand what constitutes
7 a reasonable investigation.

8 You're certainly free to argue that, counsel, but this
9 is directly from the case law that I read in trying to
10 prepare your charge.

11 MR. MANNING: And --

12 THE COURT: I preserve the defendant's objection
13 and exception. Next objection.

14 MR. MANNING: Judge, I certainly understand that I
15 would -- since we don't need to add it right there, it just
16 needs to be balanced somewhere in that instruction that the
17 requirement isn't -- it's, it's reasonable investigation.
18 The requirement isn't discover the true cause or fix the
19 issue. That's not in here yet. We need to balance it.

20 THE COURT: Well, --

21 MR. MANNING: It's only one way.

22 THE COURT: Again, you can argue that, but this is
23 the law lifted directly from the case law. And I preserve
24 your objection. Let's move on, Mr. Manning, to your next
25 objection.

1 MR. MANNING: Paragraph 9, damages.

2 THE COURT: Uh-huh.

3 MR. MANNING: My understanding was we needed to
4 modify this instruction because all that's left is
5 non-economic damages. And here it really doesn't specify
6 what they're talking about.

7 THE COURT: Well, it says compensatory. And
8 compensatory damages include non-economic damages. And
9 there is language at the bottom of Page 17 which goes into
10 the issues for which they can award damages -- I know you
11 haven't read that yet -- which will also be included on the
12 jury verdict form.

13 MR. MANNING: The -- currently the way the
14 instructions -- there's no distinction between economic and
15 non-economic made.

16 THE COURT: Uh-huh.

17 MR. MANNING: And I think that needs to be part of
18 the instructions to the jury so that they understand what
19 they're, what they're being asked to find in terms of
20 damages.

21 THE COURT: I understand your position. I
22 overrule it again because the charge does not refer to
23 economic damages and it does specifically state those items
24 of damages for which they can or cannot award damages and
25 the jury verdict form will have those specifics on it to

1 ensure that they aren't awarding damages, if they award any
2 at all, for items that are not included in my charge.

3 All right. Next objection, please.

4 MR. MANNING: I'm checking to see if there's
5 anything else in that "damages" section that I need to
6 mention here.

7 (Pause)

8 MR. MANNING: Your Honor, the only other objection
9 I have is that the Court be permitted the opportunity to
10 consider the jury instructions --

11 THE COURT: That you submitted.

12 MR. MANNING: -- that we submitted back in
13 October, 2014.

14 THE COURT: All right.

15 MR. MANNING: I'm sorry. It would have been 2015.
16 I forgot where we were in the years.

17 THE COURT: That's fine. Let the jury know that
18 they're going to have 15 to 20 additional minutes, please,
19 Officer, while I look at those instructions.

20 COURT SECURITY OFFICER: Yes, ma'am.

21 (Recess taken from 2:41 p.m. until 2:50 p.m.)

22 THE COURT: Let me say this to you all. It is 10
23 till 3:00 and there are 30 some instructions I want to go
24 through because this is my error. So I'm contemplating
25 sending the jury home. Either of you want to take a

1 position?

2 MR. YOUNG: We, we don't have any position, Your
3 Honor. It's entirely up to the Court.

4 THE COURT: All right.

5 MR. KENNEY: We would certainly just like the
6 Court to consider our instructions so --

7 THE COURT: I want to take time to do that. I
8 think that's fair and appropriate. But I believe it will
9 take some time for me to do that and to also incorporate any
10 that I believe should be included in the charge.

11 So in the meantime, the jury is just waiting. And once
12 I finish it, and I don't know when that will be, whether or
13 not you'll have time to get your closings in and they will
14 have any time left to deliberate today anyway.

15 So my proposal is that we start fresh on Monday
16 morning. No objection I take it.

17 MR. YOUNG: None, Your Honor, on behalf of
18 plaintiff.

19 THE COURT: Let's get the jury.

20 And, Mr. Kenney, my apologies to your client for my
21 error.

22 MR. KENNEY: We understand, Your Honor. Thank
23 you.

24 (Jury returned into the courtroom at 2:51 p.m.)

25 THE COURT: You all be seated, ladies and

1 gentlemen.

2 I am going to release you all for the evening. I have
3 some work to do and I don't want you to be locked back there
4 in the jury room waiting on me and I'm not sure how long it
5 will take me. So I'm going to release you for the weekend.

6 While you're out, do not discuss this case among
7 yourselves or permit anyone to discuss it with you or in
8 your presence. Don't listen to, view, or read any media
9 coverage that there might be of the trial. And please be in
10 your jury lounge promptly at 9:30 on Monday morning. Have a
11 good, restful weekend.

12 (Jury excused from the courtroom at 2:53 p.m.)

13 THE COURT: All right, counsel, I will take the
14 opportunity to review the instructions and provide you with
15 a new copy of the charge of any that I've incorporated on
16 Monday morning at 9:00. And the jury will be here at 9:30.

17 You all have a good, restful evening. We'll stand in
18 recess for your purposes at this point. Thank you all.

19 (Trial recessed at 2:54 p.m.)
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1 I, Lisa A. Cook, Official Reporter of the United
2 States District Court for the Southern District of West
3 Virginia, do hereby certify that the foregoing is a true and
4 correct transcript, to the best of my ability, from the
5 record of proceedings in the above-entitled matter.

6
7
8 s\Lisa A. Cook

June 17, 2016

9 Reporter

Date

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